IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-659

BERTHA JACKSON,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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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.

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

On October 11, 2004, an information was filed charging Bertha Jackson with one count of aggravated battery, with a deadly weapon/great bodily harm (R. 25).

Ms. Jackson was declared indigent and provided with a public defender (R. 32). On November 1, 2004, Glenn Anderson, conflict counsel, was appointed to represent her (R. 34). Ms. Jackson entered a written plea of not guilty on November 5, 2004 (R. 35).

An amended information was filed on May 13, 2005, charging Ms. Jackson with aggravated battery, with a deadly weapon/firearm enhancement (R. 36).

A jury was selected before Circuit Court Judge Maloney, but the trial was held before Circuit Court Judge Raiden on May 19, 2005 (T. 1-8). Before trial, the State attempted to introduce Williams Rule evidence, but the State failed to provide advance notice of this request. The judge denied the State motion (T. 5). Also before trial, defense counsel objected to the large blown-up photographs of the victim's injuries that the State intended to use at trial, arguing that they were too prejudicial. The judge said the photographs were relevant and he allowed them into evidence (T. 6-7).

The State presented two witnesses and then rested its case (T. 21-56). Defense counsel moved for a judgment of acquittal (T. 56-57), which was denied, but not placed on the record (T. 56-57). Ms. Jackson did not testify in her own defense (T. 57).

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).

After the jury was excused, the prosecutor asked if the victim could give her sentencing testimony now as she lived in North Carolina, and it would be difficult for her to return to Florida in the future. The judge said he would hear from her, but by the time he made this decision, defense counsel had left the courtroom. After a lunch recess, defense counsel still was absent, but the trial court proceeded to take testimony from the victim (T.98-104). After the victim testified, defense counsel was reached by telephone at his office, and was told what had occurred in his absence (T. 105).

At sentencing on July 27, 2005, the judge sentenced Ms. Jackson to five years in prison, followed by seven years probation, with credit for 70 days time served. The judge reserved jurisdiction on restitution (R. 62).

A timely notice of appeal was filed on August 3, 2005 (R. 57).

On October 25, 2005, a Motion to Correct Sentencing Error was filed, alleging that Ms. Jackson was orally sentenced to a second-degree felony, while the documentation indicated that it was a first-degree felony with a firearm (R. 78-97). The jury found Ms. Jackson guilty of aggravated battery with a weapon, and not a firearm.

The trial court entered an order to show cause on November 15, 2005 (R. 99-100). The judge said he agreed with Ms.

Jackson's first argument that the judgment and sentence incorrectly denoted that Ms. Jackson was convicted of aggravated battery with a firearm when the jury only found her guilty of using a weapon, not a firearm (T. 99-100). The court ordered the State to respond to whether Ms. Jackson was sentenced to a first-degree or second-degree felony (T.99-100). The State argued that the trial judge intended to sentence Ms. Jackson to a first-degree felony (T. 101-102).

On November 21, 2005, the trial court granted Ms. Jackson's Motion to Correct Sentencing Error. The judge found that since the information was unclear and based on the uncertainty in the documents, Ms. Jackson could only be convicted of second-degree felony aggravated battery. A corrected judgment and sentence was filed in the court file (R. 105-107, 112). The sentence Ms. Jackson received did not change.

On direct appeal, Ms. Jackson argued that she was denied access to counsel during the taking of sentencing testimony–a critical stage of the proceedings–and it was fundamental error. The Second District Court of Appeal affirmed the judgment and sentence, holding that the error affecting her sentencing proceeding should have been preserved for appeal either at trial or in a Rule 3.800 (b)(2) motion. Bertha Jackson v. State, 952 So. 2d 613 (Fla. 2d DCA 2007). Two judges of the three-judge panel found that the sentencing error should have been raised in a Rule 3.800 (b) (2) motion. One judge, while concurring with the majority, disagreed on how the error should have been preserved. Judge Stringer said that Ms. 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)(2) motion. Id. at 615-616.

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 (b)(2).

This Court accepted jurisdiction on July 3, 2007 based on the conflict between the circuits.

STATEMENT OF THE FACTS

On September 7,2004, Officer Jeremy Davis of the Winter Haven Police Department, was on patrol when he responded to a battery at First Street Northeast. There, he met Shiauntae Ross, who had blood on her face and was screaming and crying. He saw lacerations on the left side of her face (T. 21-22).

Ms. Ross told police that she was walking to a nearby store on Avenue T when a white car drove up. Inside were two black men and one black female (T. 22-23). The black female got out of the car and started fighting with Ms. Ross. Ms. Ross was cut with an object (T. 22-23). The woman then left in the car. Ms. Ross returned home and called police (T. 22).

Officer Davis issued a Be On the Lookout (BOLO) for the car and its occupants. He contacted emergency medical personnel, and when they arrived, he followed them to the hospital (T. 23).

At the hospital, the officer interviewed Ms. Ross again. He photographed her injuries, which he said appeared to be lacerations caused by a weapon with an edge. He described them as clean cuts (T. 23).

While talking to Ms. Ross at the scene, Alfonso Johnson rode by on a motor scooter. Ms. Ross pointed him out to police as being at the scene, but not involved in the fight. Ms. Ross identified her attacker as Bertha Jackson (T. 24).

Officer Davis identified photographs of Ms. Ross, which included lacerations to the left side of her face, above her eye, on her shoulder and neck. The photographs were received into evidence (T. 24-25).

On cross examination, Officer Davis said he was the only officer who responded to the scene. He prepared the case report, but did not speak to Ms. Jackson. All the information he obtained on the incident came solely from Ms. Ross. He spoke to Mr. Johnson, but Mr. Johnson denied seeing the fight and had nothing to add (T. 27-28).

Ms. Ross told the officer that Ms. Jackson reached around her body and cut her. Ms. Ross never saw an object and did not know what was used to cut her (T. 28).

Officer Davis, who said he was a police officer for three years, described the cuts as clean. He did not assume a razor was used, but knew that it was a weapon with an edge because it was a clean cut. He said it could have been a razor or a very sharp knife. No weapon was found (T. 29-30). The officer said Ms. Ross’s clothes were covered in blood, but he did not inspect her clothing. He tried to calm down Ms. Ross. He described the scene as “hectic” (T. 30).

Ms. Ross, 20, a student and a mother of a small child, testified that she now lives in North Carolina. She said she was attacked by Bertha Jackson on September 7, 2004 (T. 31-32).

She identified Ms. Jackson in the courtroom (T. 46).

Ms. Ross testified that she knows Ms. Jackson through her child's father. Her baby's father and Ms. Jackson's boyfriend were good friends (T. 32). Ms. Ross denied there was any bad blood between the two women before the fight. Ms. Ross said the two women got into a disagreement on one prior occasion.

She explained that the two women were acquaintances until Ms. Jackson saw her with an old boyfriend, and then Ms. Jackson stopped speaking to Ms. Ross (T. 32).

On September 7, 2004 at 9 p.m., Ms. Ross was visiting her mother when her mother asked her to go the store. Ms. Ross walked to the store, which was one block away. On her way, she ran into Ms. Jackson and two men. Ms. Jackson was in the back seat of a white car and the two men were in the front seat.

The car came to a stop at a stop sign. Ms. Ross said she stopped, too. Ms. Jackson began yelling obscenities at her, and said things such as, "There that bitch right there" and "I'm going to get that bitch" (T. 34).

Ms. Ross described those as "fighting words," but she did not respond and said she did not want to fight Ms. Jackson (T. 33-34).

Ms. Ross continued on her way. She walked around the car and continued walking to the store. The vehicle went in the opposite direction. She arrived at the store and went inside. She said she only had her cell phone on her hip. She did not carry a purse.

She left the store and saw the white car pull up. All the occupants jumped out. She said Ms. Jackson came rushing towards her to fight. Ms. Ross said she kicked off her shoes and tried to hit Ms. Jackson with her shoes, but Ms. Jackson was too fast for her. She said she knew that Ms. Jackson was trying to hit her (T. 37-38). Ms. Jackson had one hand opened and another hand closed, but she saw no weapon in Ms. Jackson's hand (T. 41).

Ms. Ross said she had no place to run. She was blocked in by Ms. Jackson, and she was scared. She said Ms. Jackson grabbed her and held her. Ms. Jackson's boyfriend and another man were telling Ms. Jackson to hit Ms. Ross, but the men did not touch her.

Ms. Ross felt a scratch in her eye, and then saw blood on her shirt. She panicked and did not want to fight anymore. She ran into the store, and told the people inside to call police. When she walked out of the store, Ms. Jackson was still there. She said Ms. Jackson looked at her and smiled. One of the men said, "You're leaking." (T. 39).

Ms. Ross began walking to her mother's house. Ms. Jackson returned, ran behind her and grabbed her in a choke hold. Ms.

Ross said she turned around but did not want to fight anymore (T. 39). Ms. Jackson's boyfriend then grabbed Ms. Jackson by the wrist, and got blood on his pants.

Ms. Ross screamed, "Let me go," and returned to her mother's house. She was in shock and saw blood running down her neck, arms and face (T. 40-41). She was taken to the hospital with lacerations on her face. She said she was cut above her eye, under her ear, around her neck, on her head and arm (T. 41-42).

The prosecutor asked Ms. Ross to show her scars to the jury. She said she received stitches on her eye, the left side of her face, under her ear and on her arm. The doctor told her she suffered lacerations with a sharp object (T. 44).

After the attack, Ms. Ross tried to enlist in the Army, but was told her eyesight was going bad. Before the attack, she said she had 20/20 vision (T. 46).

On cross examination, Ms. Ross said she was studying business at the Statford Career Institute (T. 46).

When Ms. Jackson first approached her, Ms. Ross said she was not frightened. She did not want to fight, but she knew that a fight was imminent. She initially did not think that Ms. Jackson
was a threat. Ms. Ross did not say anything to provoke an attack.

She heard Ms. Jackson say, "There go that bitch," but Ms. Ross did not respond. Instead, Ms. Ross went the other way, and believed the altercation was over as she walked to the store. She was in the store for two minutes. When she left the store, she saw Ms. Jackson run towards her. Although Ms. Ross had a cell phone on her hip, she did not think about using it and did not have time to call police. She was not afraid at that point, and saw Ms. Jackson go the other way.

Ms. Ross denied starting the fight, and denied attempting to strike the first blow. She agreed that her shoes, made of hard plastic, made a good weapon, (T. 53), but she insisted that there was no bad blood between the two women. She explained that when Ms. Jackson saw Ms. Ross with an old boyfriend, Ms. Jackson had a problem with it, and they had words at that time (T. 50-51). Ms. Ross said the word "bitch," is accepted language (T. 51).

Ms. Ross said she defended herself and used her shoes in self-defense. She grabbed Ms. Jackson after Ms. Jackson swung at her. She did not see a weapon in Ms. Jackson's hand (T. 54-55). The State then rested its case (T. 56).

Defense counsel moved for a judgment of acquittal, but the denial of the motion was not placed on the record (T. 56). Ms. Jackson testified in her own defense (T. 58-59).

After closing arguments and the jury was instructed, it returned a verdict of guilty of aggravated battery with a weapon (T. 93).

The judge adjudicated Ms. Jackson guilty, revoked her bail, and set sentencing for four weeks later. He ordered a pre-sentence report (T. 93). The jury then left the courtroom (T. 94).

The prosecutor then asked if Ms. Ross could give her sentencing testimony today to avoid having to return to court the next day. 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. The bailiff did not know where he was. 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 said Ms. Ross was not leaving the State until the next day, but the judge said he had business elsewhere the next day. He 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 then saw no reason to delay the testimony of Ms. Ross. While he said he could not legally impose sentence today, he saw no impediment to having Ms. Ross testify so she does not have to come back at another time.

The judge announced on the record that he would take Ms. Ross’s statement today. He said:

The jury in this case returned a verdict 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 down 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 has a right to 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 (sic) that Ms. Ross was downstairs, I said go down there and get her and I'll take her statement today. 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.

Ms. Ross, if you will step up, I have some questions for you.
(T. 96-98).

Ms. Ross came forward and the judge reminded her that she was still under oath. The judge began to question her. She said that at the time of the incident, she was living in Winter Haven and has one child, who is 2 years old. She said the child's father was not involved with Ms. Jackson in any way.

Ms. Ross said she has known Ms. Jackson for two years, and met her in the neighborhood where they lived. They were not close friends, but acquaintances. (T. 99).

While the two women were on good terms, Ms. Jackson allegedly saw Ms. Ross with one of her old boyfriends and "we just fell out then." (T. 100).

Ms. Ross denied any violence between the women before this day. The judge asked to see Ms. Ross's scars up close and he saw a scar over one eye, on her face, neck and arm (T. 101-102).

The judge asked Ms. Ross if she had any medical bills. The

prosecutor interjected and said the medical bills totaled several thousand dollars (T. 102).

Ms. Ross said she had Medicaid, but she did not pay all of her medical bills (T. 103). Ms. Ross denied missing work from these injuries. She added that she tried to enter the military, but was told that her eyesight was going bad, and that she may be blind in one eye in the next two years. Before that time, she was healthy and had 20/20 vision (T. 104).

After the judge's questioning was nearly completed, defense counsel, Mr. Anderson, was reached by telephone in his office in Winter Haven. On speaker phone, Mr. Anderson said he did not know that the judge intended to take the victim's statement so she would not need to return from North Carolina. The judge said he thought he made it clear, and added that he had already taken Ms. Ross's statement. "You can listen to the rest. I will go further and tell you what I have gotten so far." (T. 105).

The judge repeated what had occurred, and said that Ms. Ross has incurred $5,000 to $6,000 in medical bills. He said he looked at her scars, and that she was losing her sight in one eye, which she attributed to the injury.

The judge told Ms. Ross that Ms. Jackson was facing 30 years in prison, without a minimum sentence. The prosecutor said that Ms. Jackson scores 34.9 months in prison.

Ms. Ross said she did not think that three years in prison was enough time for Ms. Jackson (T. 107), but added that 30 years was too much time (T. 109). She said she made it clear to Ms. Jackson that she did not want to fight, yet Ms. Jackson did, and it affected her deeply. She said her confidence has been shattered, and her daughter has begun to notice the scars on her face (T. 109).

At sentencing on July 27, 2005, the State said Ms. Jackson scored 34.9 months in prison. The prosecutor suggested that five years in prison followed by two years probation would be a fair sentence (R. 44-48).

Defense counsel said that Ms. Jackson is leaving behind a 5-year-old child and an ill mother (R. 48-49). Ms. Jackson said she needed to be home to take care of her child. She said she knew she was wrong for fighting and apologized for it (T. 49).

The judge called the attack on Ms. Ross unprovoked, and found that Ms. Jackson only showed remorse on sentencing day. He said the attack, which was over a man, resulted in the facial disfigurement of Ms. Ross and damage to her eye (R. 49-50). The judge said he was not concerned about Ms. Jackson's son or mother, because she showed no concern for them.

The judge adjudicated Ms. Jackson guilty of aggravated battery, and sentenced her to five years in prison, followed by

seven years probation. As conditions of her probation, Ms. Jackson was ordered to have no weapons or firearms, and no contact with the victim. She was ordered to obtain gainful employment and abide by a curfew of 10 p.m. to 6 a.m. The judge imposed standard court costs (R. 50-51).

SUMMARY OF THE ARGUMENT

The Second District Court's opinion in Jackson v. State, 952 So. 2d 613 (Fla. 2d DCA 2007) conflicts with 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)(2) 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.

Jackson 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. Lack of counsel at sentencing is a Sixth Amendment due process violation that is of fundamental proportions and should not be subject to the contemporaneous objection 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 ex parte testimony had already been taken. This Court should quash the decision below.

ARGUMENT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN VICTIM TESTIFIED WITHOUT DEFENSE COUNSEL PRESENT. THIS WAS A CRITICAL STAGE OF THE PROCEEDING. THIS EX PARTE HEARING VIOLATED MS. JACKSON'S DUE PROCESS RIGHTS.

After the jury reached its verdict, the judge adjudicated Ms. Jackson guilty and set a sentencing date. He revoked Ms. Jackson's bail and ordered that a pre-sentence investigation be completed. He advised her that she was facing a 30-year prison sentence, with no minimum sentence (T. 93-94).

The judge then excused the jury and set sentencing four weeks from the verdict date (T. 94).

The prosecutor then asked if she could present the testimony of Ms. Ross, who was present and not scheduled to leave the state until the next day. The judge ordered that Ms. Ross be brought into the courtroom (T. 94-95). He ordered everyone to remain in the courtroom, but the record indicates that defense counsel, Mr. Anderson, left the courtroom (T. 95).

After a short recess, the judge asked about the whereabouts of Mr. Anderson. Neither the bailiff nor the prosecutor knew where he went.

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 said that Ms. Ross would be available to return to court the next day. The judge found that option unacceptable because he had other matters and trials scheduled.

He 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 suggested a lunch break and said he would return in one hour. After the lunch break, defense counsel was still not present. The judge said he was reluctant to take the testimony without defense counsel present, but did so nevertheless.

Ms. Ross was reminded that she was still under oath and that the State Attorney may also have questions for her (T. 98). The judge questioned Ms. Ross about her relationship with Ms. Jackson and how they knew each other. He asked to get a closer look at her injuries. The judge asked Ms. Ross 44 questions, and she responded to each of his answers. There were seven (7) full pages of testimony from Ms. Ross, all asked without the presence of defense counsel. Ms. Jackson sat at counsel table without an attorney. When defense counsel was reached by telephone at his office in Winter Haven and placed on speaker phone, the judge said he was nearly done questioning Ms. Ross.

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

The victim's testimony was the beginning of the sentencing

phase of Ms. Jackson's trial and a critical stage. Yet, Ms. Jackson was left without counsel to represent her during this critical time. See Smith v. State, 590 So. 2d 1078 (Fla. 2d DCA 1991)(treating right to counsel at sentencing as a critical stage).

During the appeal in the court below, the State argued that since the victim was permitted to submit a statement that can be considered by the court and since the statement is not subject to cross examination, "it seems clear that the fact that defense counsel was not present when the trial court questioned the victim about these specific matters, did not deprive the appellant of any constitutional right to effective assistance of counsel by denying him the right of cross examination" (Answer Brief at 23).

Yet, at this sentencing hearing, the victim was reminded that she was still under oath. The judge said he was going to ask her some questions and that the State Attorney may have some questions for her (T. 98). Clearly, if the victim made statements or allegations that were inaccurate (i.e. the amount of damages, etc.) defense counsel could have challenged them. This proceeding was not simply a matter of the judge considering the victim's impact statement. This was an adversarial proceeding, but the attorney representing the defendant was not present. This was fundamental error.

Fundamental error is error that "goes to the foundation of the case or goes to the merits of the cause of action..." Jacques v. State, 883 So. 2d 902, 906 (Fla. 4th DCA 2004), or

one "[which] reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Caldwell v. State, 920 So. 2d 727 (Fla. 5th DCA 2006). To be deemed fundamental, a defendant bears the burden of proving that the error is harmful. Sampson v. State, 903 So. 2d 1055, 1058 (Fla. 2d DCA 2005). Ms. Jackson has proven that her rights to counsel were violated, and she was not represented by counsel at this critical stage of the proceedings.

An accused's right to be represented by counsel is a fundamental component of the criminal justice system. Lawyers in criminal cases are "necessities, not luxuries." United States v. Cronic, 466 U.S. 648 (1984).

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." Cronic, 466 U.S. at 653. 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).

Trial, sentencing and direct appeal are all critical stages at which a defendant is entitled to counsel. Smith v. State, 590 So. 2d 1078 (Fla. 2d DCA 1991). 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).

It also has been held that the reading of jury instructions and discussions concerning the evidence outside the presence of the jury are both critical stages of the trial requiring the presence of counsel. See, Fruetel, 638 So. 2d at 971; Vileenor v. State, 500 So. 2d 713, 715 (Fla. 4th DCA 1987).

The trial judge questioning the victim about her version of events and asking to examine her injuries was the taking of evidence regarding 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. She was left to the mercy of the judge who, while cognizant of the error, chose not to protect her interests.

Florida Rule of Appellate Procedure 9.140 (e) provides that

a sentencing error may not be raised on appeal unless the error has first been brought to the attention of the lower tribunal at the time of sentencing or by a 3.800 (b)(2) motion. But in this instance, the judge knew precisely what was occurring since he created the situation himself. He knew that by going forward without Ms. Jackson's attorney, he was creating "reversible error" (T. 95). Unlike other cases where the error must first be brought to the attention of the trial judge, it was the trial judge here who created this situation and was fully aware of it.

The judge's conduct was reversible error, and he knew it, yet he proceeded anyway. He knew that if he took testimony from the victim without defense counsel's presence, it would be an ex parte hearing and would constitute reversible error. The judge never questioned Ms. Jackson on whether she was waiving her attorney's presence and wanted to proceed without him. The judge did not conduct a Faretta[1] hearing to determine if Ms. Jackson wanted to represent herself. The court's failure to conduct a Faretta inquiry is per se reversible error. State v. Young, 626 So. 2d 655, 657 (Fla. 1993)(requiring a reversal where there is not a proper Faretta inquiry). See also, Wilson v. State, 947 So. 2d 1225 (Fla. 1st DCA 2007)(the lack of representation at resentencing is not a sentencing error, but rather a due process error, and the issue may be raised on appeal even if it was not preserved).

This lack of representation at a sentencing hearing is not

[1]Faretta v. California, 422 U.S. 806 (1975).

a sentencing error contemplated under Rule 3.800, but an error in the trial process itself and a violation of Ms. Jackson's Sixth Amendment 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)(2) motion. Yet, this was impossible to achieve at Ms. Jackson's sentencing hearing since the testimony of the victim was taken **before** counsel was even contacted or present.

Two judges of the Second District's panel 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)(2) motion. Thus, the conflict is not

only within the district courts, but within the panel of judges themselves.

The contemporaneous objection rule requires the complaining party to timely object to the error to preserve it for appellate review. The rule is intended to eliminate "legal trickery and procedural gamesmanship by crafty litigants who intentionally cause error or allow error to creep into the trial proceedings so they can complain about it on appeal." The rule also provides the trial court with a timely opportunity to correct the error and avoid mistrial or reversal on appeal. Caldwell v. State,920 So. 2d 727, 730-731 (Fla. 5th DCA 2006). But in this instance, there was no legal trickery or gamesmanship. The defense counsel was completely absent from the proceedings. The trial judge himself was not going to correct an error that he already acknowledged and ignored. Thus, any contemporaneous objection would have been futile.

The majority of the Second District relied on Harley v. State, 924 So. 2d 831, 832 (Fla. 2d DCA 2005), a vindictive sentencing case, for support. The issue of a vindictive sentence was not raised at Harley's sentencing or in a 3.800 (b)(2) motion, and it could not be considered on direct 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 vindictive sentencing issue in Harley involved his

sentence and did not involve being without counsel to object to the vindictive sentence.

This case is more akin to Dorsett v. State, 873 So. 2d 424 (Fla. 3d DCA 2004), which held that double jeopardy, a constitutional requirement, is fundamental error that can be raised for the first time on direct appeal. In Dorsett, the defendant argued on appeal that he could not be convicted and sentenced to both robbery with a firearm and the separate offense of possession of a firearm in the commission of the same robbery. The State argued that under Brannon v. State, 850 So. 2d 452 (Fla. 2003), the defendant could not raise the error on appeal because he did not object to the sentence imposed at the time of the sentence and he failed to file a motion under Rule 3.800 (b)(2). The appeals court found that the State's reliance on Brannon was misplaced.

The court in Dorsett held that the error complained of did not occur during the sentencing process. Instead, he argued that his conviction must be vacated, and did not turn into a sentencing error. The appeals court agreed.

In this case, Ms. Jackson did not have counsel present who could object on her behalf. It was impossible for her attorney to object contemporaneously when he was not even in the courtroom or aware that sentencing testimony was being taken in his absence.

Moreover, this case did not involve 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, as commonly raised in a Rule 3.800 motion. Maddox v. State, 760 So. 2d 89, 101-110 (Fla. 2000).

None of the cases cited by the Second District Court of Appeals in Jackson involved a defendant who did not have counsel present to object on her behalf. Allende v. State, 882 So. 2d 472 (Fla. 5th DCA 2004) involved a vindictive sentencing case where the defendant was represented by counsel. Both Summerlin v. State, 901 So. 2d 997 (Fla. 2d DCA 2005) and Hakkenberg v. State, 889 So. 2d 935 (Fla. 2d DCA 2004) involved defendants who were represented by counsel, but who did not object to the successor judge imposing sentence.

But in this case, Ms. Jackson had no counsel who could object on her behalf. The issue here is her access to counsel at an adversarial proceeding. This lack of access was not what was contemplated in Rule 3.800 (b)(2) motions. It is a due process violation.

The lack of an attorney to represent Ms. Jackson was fundamental error of constitutional dimensions. The Sixth Amendment guarantees the right to counsel at critical stages. This testimony was the start of Ms. Jackson's sentencing 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. Neither should the fact that

this error was not raised in a Rule 3.800 (b)(2) motion.

Moreover, the judge's contact with the prosecution and the state's witness was ex parte contact. Due process guarantees the right to a neutral, detached judiciary "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978).

A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing.

_____ But here, the trial judge lost all semblance of impartiality when, against his better judgment, he began questioning Ms. Ross in the absence of defense counsel. The fact that he finally made contact with defense counsel after completing seven pages of questioning of the victim does not cure the error. Defense counsel had no way of knowing whether what the judge was telling him was true or how the victim testified in response to his questions. Defense counsel had no idea whether the victim's responses were admissible or proper. Thus, this error could not be cured by an after-the-fact disclosure by the court.

Ex parte rules are in place to prevent the very event that the judge participated in here. Prejudice to Ms. Jackson is

presumed when ex parte communication occurs because a criminal defendant, uneducated in the legal intricacies of criminal procedure, cannot be deemed to have knowledge of the law without her attorney, regardless of the reason for his absence.

Ms. Jackson was left to the mercy of the judge who 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.[2] 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. Ms. Jackson is entitled to relief.

[2]In fact, the judge's recounting of the victim's testimony was not accurate. The record shows that the state said the victim's medical expenses "totalled" in the several thousands (T. 102). The trial judge told defense counsel when he was finally contacted by phone that the victim had testified that her medical expenses were $5,000-$6,000 dollars (T. 105). No proof of her actual medical expenses was admitted into evidence.

CONCLUSION

Based on the foregoing arguments and authorities, Ms. Jackson is entitled to relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief on the Merits has been furnished by United States Mail, first-class postage prepaid to Ha Thu Dao, Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 on this 26th day of July, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Petitioner's Initial Brief on the Merits satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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