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

REPLY BRIEF OF PETITIONER ON THE MERITS

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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.

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

ARGUMENT IN REPLY

ARGUMENT I
THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE 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.

The State begins its argument by stating that there is no conflict between Jackson v. State, 952 So.2d 613 (Fla. 2d DCA 2007) and Gonzalez v. State, 838 So. 2d 1242 (Fla. 1st DCA 2003), (Respondent's Brief at 20).

This position is directly contradicted by its own argument in the Respondent's Jurisdictional Brief, where it said that "Respondent acknowledges that **there exists express and direct conflict between the Second District in Jackson, and the First District in Gonzalez** "(Jurisdiction Brief of Respondent at 3, emphasis added). In the jurisdictional brief, the Respondent argued that the difference in the two cases was simply a matter of "different factual circumstances regarding the two cases" (Jurisdiction Brief of Respondent at 4).

But now, the Respondent argued that there is no longer a conflict. It is unclear what happened between May 23, 2007 when the Respondent's Jurisdictional Brief was filed, and August 20, 2007 when the Answer Brief on the Merits was filed. No new case law resolving the issue has been handed down.

Thus, the conflict still exists among the circuits. It exists among the three-judge panel of the Second District Court of Appeals that decided Jackson, and apparently exists within

the Office of the Attorney General.[1]

However, in the Respondent's rush to defend the Second District's Jackson opinion, it overlooks the constitutional argument raised by Ms. Jackson. Nowhere does the Respondent address that Ms. Jackson's argument is premised on a Sixth Amendment right to counsel.

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. U.S. Constitution, Amendment VI. The Sixth Amendment guarantees criminal defendants the right to be represented by counsel and the related right to effective assistance of counsel. These rights fully apply at a sentencing hearing, which has been called a "critical stage" of the criminal proceeding." United States v. Huff, 512 F. 2d 66,71 (5th Cir. 1975) citing Mempha v. Rhay, 389 U.S. 128, 134 (1967)(extending the Sixth Amendment right to counsel to sentencing hearings, in part, because of "the critical nature of sentencing in a criminal case"). See, State v. Scott, 439 So. 2d 219 (Fla. 1983)(the indigent prisoner is entitled to appointment of counsel at sentencing as the sentencing is a critical stage of the criminal proceedings).

Instead of addressing whether Ms. Jackson was deprived of access to counsel at a critical stage, the Respondent spends the

[1]It should be noted that Assistant Attorney General Ronald Napolitano filed the Jurisdiction Brief of Respondent while Assistant Attorney General Ha Thu Dao filed the Respondent's Brief on the Merits. Both attorneys work in the Tampa office of the Attorney General.

majority of its argument explaining the history of how Fla. R. Crim. P. Rule 3.800 came about, and listing numerous cases upholding the rule. Yet, **none** of the cases cited by the Respondent involve issues where the defendant was forced to attend a hearing without defense counsel and where the trial court questioned the victim about her injuries. In none of the cases cited by the Respondent, did the judge ask the victim 44 questions about her injuries while the defendant had no counsel to represent her or had the ability to object to any improper questions by the judge. Likewise, none of the judges in these cases admitted they had committed reversible error.

Each of the cases cited by the Respondent involved a sentencing error -- a written judgment that did not conform to an oral pronouncement, illegal or vindictive sentences, or being sentenced by a successor judge. None of the cases cited by the Respondent involve defendants being left alone without the presence of defense counsel while the judge questions the victim about her injuries and medical bills.

None of the cases cited by the Respondent involved the defendant's Sixth Amendment right to counsel or that counsel was absent from a critical stage of the proceeding.

The Respondent argued that Ms. Jackson has shown no reason why her case is different from the 3.800 cases she cited and Rule 3.800. The Respondent's argument suggests that every error, no matter what kind, that occurs at sentencing is a sentencing error cognizable under Rule 3.800. But, that is untrue.

A "sentencing error" is defined as errors in orders entered as a result of the sentencing process including harmful errors. This includes errors in orders of probation, orders of community control, cost and restitution orders, as well as errors within the sentence itself." Amendments to Fla. R. of Crim. P. 3.111(e) and 3.800 & Fla. R. of App. P. 9.02(h), 9.140, & 9.600, 761 So. 2d 1015, 1018 (Fla. 2000).

But the error in Ms. Jackson's case has nothing to do with any of the categories listed in Rule 3.800. The error does not involve the length of sentence Ms. Jackson received, a probationary order, cost or restitution orders or a guidelines calculation issue. It had nothing to do with a vindictive sentence. Instead, what occurred in Ms. Jackson's case involved the absence of counsel, which goes to the unconstitutional nature of the proceeding itself.

The Respondent also argued that the trial court is the best tribunal to address sentencing errors because the appeals court's job is not to calculate score sheets, or determine if a written order complies with an oral pronouncement. The Respondent also argued that the trial court was the best forum to correct the error (Respondent's Brief at 36).

But, the Respondent failed to address that it was the trial judge himself who admitted he was creating error in the first place. When the judge was told that defense counsel could not be found, he 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)(emphasis added).

The judge knew that Ms. Jackson had a Sixth Amendment right to counsel at the hearing. He told her that he would not impose sentence that day, presumably because her counsel was not present, but he was going to hear the victim's sworn testimony. He told Ms. Ross he was going to question her under oath, and that the State Attorney may also have some questions for her. Ms. Jackson was not told that she or her attorney could inquire of Ms. Ross. It was as if Ms. Jackson and her attorney did not exist and were irrelevant to the proceedings. Nothing in the record suggests that Ms. Jackson waived her right to be represented by counsel. See, Johnson v. Zerbst, 304 U.S. 458 (1938)[No waiver can be presumed from a silent record].

The judge admitted he was creating reversible error. He went forward anyway, asking Ms. Ross 44 questions about her injuries, her life and her background with Ms. Jackson. The defense attorney was contacted only after the judge was nearly done with his examination. The judge told defense counsel, "You can listen to the rest. I will go further and tell you what I have gotten so far." (T. 105). But by then, it was too late. The judge was nearly done. He recited a summary of what Ms. Ross had testified to, but defense counsel had no way of knowing if it was accurate or not. There was no need for a contemporaneous objection because the judge already conceded he had committed error. The purpose of an objection is to make the court aware that it has committed error. Here, such an

objection would have alerted the court to nothing since it already knew it was committing reversible error.

Moreover, the time to object would have been contemporaneously at the beginning of Ms. Ross's testimony or during the parts of her testimony that were objectionable. Ms. Ross's testimony had already passed. Thus, any objection would have been futile.

The Respondent also argued that the error was not fundamental because the victim only gave "a partial statement" which was similar to the victim's trial testimony. But, at trial, Ms. Ross only testified to receiving lacerations on her face, neck, head and arm, that required stitches. She said her eyesight was going bad and the Army would not let her enlist (T. 44-46). That was the extent of Ms. Ross's trial testimony.

But, at sentencing, the judge elicited information that was not previously presented. The judge questioned Ms. Ross about her two-year-old child and Ms. Ross said she had moved from Winter Haven to North Carolina. Ms. Ross discussed her history with Ms. Jackson-–that she had known Ms. Jackson for two years and lived in the same neighborhood. They had friends in common and that the two women remained friends for several years. She said Ms. Jackson and she partied and drank together, but then "fell out" as friends.

Ms. Ross showed the judge her injuries and she was asked about her medical bills. She explained that she had Medicaid, but was still responsible for out-of-pocket expenses, totaling $5,000 to $6,000. She had not paid those bills, and was getting

nasty letters from a collection agency. It was not clear whether Ms. Ross showed any documentation of these allegations or expenses. It is obvious that Ms. Ross's testimony at sentencing was significantly different from her trial testimony.

The Respondent also argued that this was only a "partial statement" and therefore acceptable. But, Ms. Ross did not give her own statement of her own volition in her own words. She was examined by the trial judge. It does not matter if Ms. Ross was asked one question or 100 questions. The entire process was tainted when the judge took over the role of prosecutor and questioned Ms. Ross about her injuries, her home life, her child, her relationship with Ms. Jackson, all under the guise of a sentencing proceeding without defense counsel present. This was a critical stage of the proceedings and a Sixth Amendment violation.

Here, Ms. Ross was under oath. The judge said he would question her and that the State Attorney may have some questions for her. The judge did not mention the defense questioning her. Nor was there an opportunity for defense attorney to challenge Ms. Ross or to cross examine her since he had no way of knowing what she had said. Ms. Jackson had no defense attorney to object to irrelevant testimony or improper questions by the judge. This was an adversarial hearing, but without a critical party--the advocate for Ms. Jackson.

The Respondent also failed to address that a proceeding without defense counsel present is an *ex parte* hearing. The judge had contact with the prosecution and a prosecution

witness, without defense counsel present. The judge lost all semblance of impartiality when he became a prosecutor and questioned the witness, knowing that all the parties were not present. This was not a full and fair proceeding.

There is nothing "more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant." Roberts v. State, 840 So. 2d 962 (Fla. 2002), citing State v. Riechmann, 777 So. 2d 342, 351 (Fla. 2000).

The Respondent also argued that undersigned counsel, "like many others, has been seduced by the misapplication of the concept of the fundamental error analysis" (Respondent Brief at 31). If undersigned counsel misapplied the concept of fundamental error, then so did the United States Supreme Court in Holloway v. Arkansas, 435 U.S. 475 (1978), when it held that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial"), and in United States v. Cronic, 466 U.S. 648 (1984) when it held that an accused's right to be represented by counsel is a fundamental component of the criminal justice system.

Undersigned counsel is in good company with this Court who also misapplied the concept of fundamental error analysis in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), when this Court held that "denial of counsel is always harmful, regardless of the strength of the admissible evidence, can be properly categorized as per se reversible."

The First District Court of Appeals apparently succumbed to this seduction as well when it issued Gonzalez, and affirmed that position most recently in 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).

The Respondent further argued that under Florida Statute 921.143 (2004), the victim is entitled to appear before the sentencing court under oath and submit a written statement under oath to be filed with the sentencing court. The Respondent suggested that since the victim is permitted to submit a written statement, that her testimony in court here was the equivalent of submitting a written statement. The Respondent insisted the statement would be admissible despite not being subjected to cross examination. However, Ms. Ross did not submit a statement in her own words of her own volition. It was the trial court who elicited the information that she gave as a victim-impact statement. Since the statement was not written, Ms. Ross was subject to questioning by the defense, had Ms. Jackson's counsel been present.

Moreover, the Respondent omitted that while victims are entitled to be heard in criminal proceedings, they may do so **only** to the extent that doing so does not interfere with a defendant's constitutional rights. And, those rights include the right to cross examine victim witnesses and the right to object to the victim's statement when it goes beyond what is acceptable for the court to consider. See, Article 1, Section

16 (b), Florida Constitution.

Ms. Jackson has never argued that Ms. Ross did not have a right to testify to the injuries she received or the impact the crime had on her life. On the contrary, Ms. Jackson complained that the process and procedures under which Ms. Ross testified were improper.

Finally, the Respondent suggested that Ms. Jackson was not prejudiced by the judge's *ex parte* conduct because he did not "overreach" by imposing the maximum 30-year sentence. But Ms. Jackson was harmed by the absence of her defense attorney. It is not known what sentence could have been imposed had counsel been present to protect Ms. Jackson's rights.

Ms. Jackson was left alone while the judge questioned Ms. Ross. Ms. Jackson had no one to object on her behalf to the judge's questions or to his consideration of improper factors because he did not know about them. The judge chose to ignore his obligations as a neutral arbiter despite knowing that it was reversible error for him to ignore Ms. Jackson's rights.

Access to counsel at all critical stages of trial is a Sixth Amendment right. The fact that Ms. Jackson was not sentenced to the maximum sentence is irrelevant and does not prove that she was not prejudiced by the absence of her attorney. Neither the Respondent nor this Court can know what the true sentence should have been had the trial court allowed defense counsel the opportunity to represent his client. This absence of information is what makes this error fundamental and as the trial court admitted, reversible error.

CONCLUSION

Ms. Jackson is entitled to a new sentencing proceeding with access to her defense attorney.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Reply 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 8th day of September, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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