**IN THE SUPREME COURT OF FLORIDA**

CASE NO. 85,231

D.C.A. CASE NO. 93-2676

BRUNO ABREU,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

**********

ON PETITION FOR DISCRETIONARY REVIEW

**********

# BRIEF OF PETITIONER ON THE MERITS

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**BRUNO ABREU,**

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# BRIEF OF PETITIONER ON THE MERITS

## INTRODUCTION

Petitioner Bruno Abreu was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The respondent was the prosecution in the trial court and the appellee in the District Court of Appeal. The parties will be referred to as they stood in the trial court when indicated. The symbol "App." will be used to designate the appendix to this brief.

## STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Petitioner was charged by Information with Armed Kidnapping, in violation of Sections 787.01 and 775.087, Florida Statutes, [Count I], three counts of Aggravated Assault, in violation of

Section 784.021(a), Florida Statutes, [Counts II, V and VI], two counts of Aggravated Battery, in violation of Section 784.045(1)(b), Florida Statutes, [Counts III and IV], and eight counts of Sexual Battery, in violation of Sections 794.011(3) and 794.011(5), Florida Statutes, [Counts VII through XIV]. (R. 1-16).

Following a jury trial, Petitioner was convicted on Counts I, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII. (R. 18). Petitioner was acquitted on Count II and XIV. (R. 18; SR. 42; SR. 71; SR. 84). The State filed a motion for departure from the sentencing guidelines. (SR. 91-92). On February 7, 1991, the trial court sentenced Petitioner to life imprisonment on Counts I, VII, VIII, IX, and X, and to terms of fifteen (15) years' imprisonment on Counts III, IV, XI, XII and XIII, and to terms of five (5) years' imprisonment on Counts V and VI. The court ordered that the sentence on Count III to run consecutive to Count I; the sentence on Count IV to run consecutive to Count III, and the sentences on Counts V through XIII to run consecutive to each other and consecutive to Count I. The court also imposed consecutive three (3) years minimum/mandatory terms of imprisonment on Counts I, III, V, VI, VII, VIII, IX and X. (R. 20; R. 26-30). The court entered a written order of departure from the sentencing guidelines. (SR. 100-103).[1]

On appeal the Third District Court of Appeal affirmed Petitioner's conviction, but reversed the sentencing order in part

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[1] The sentencing guidelines scoresheet provided for life imprisonment. (SR. 104-104A).

and remanded for resentencing. In particular, the Third District ruled that the trial court improperly imposed consecutive minimum/mandatory terms. Abreu v. State, 610 So.2d 564 (Fla. 3d DCA 1993) On remand, the trial court corrected its Judgment and Sentence ordering that the minimum/mandatory terms run concurrently. (R. 21; R. 31). This Court denied review on June 25, 1993. The denial of review was recorded in Dade Circuit Court on July 1, 1993. (R. 32).

On March 12, 1993, the Office of the Public Defender orally announced a conflict of interest in the case. (R. 20; T. 5). On August 20, 1993, the trial court appointed Joseph Pecoraro, Esq., as attorney for Petitioner in his motion to mitigate sentence. The court ordered the appointment nunc pro tunc to August 3, 1993. (R. 17; T. 7). Petitioner's new counsel had presented the court with a motion and order to transport Petitioner to Dade County, Florida, in order to assist him in the presentation of the motion to mitigate. An order for transport was entered on August 12, 1993. (R. 33-34).[2]

On August 20, 1993, Petitioner filed a Motion to Mitigate and a Motion for Extension of Time within which the motion to mitigate may be heard. (R. 35-37). At a court hearing on that date, the trial court extended the time for the hearing. The State did not object. The following occurred:

> THE COURT: "My only question is: Do I have the authority to safely go ahead and have this hearing Monday or

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[2] As of August 19, 1993, it was still undetermined whether Petitioner had been transported back to Dade County. (1ST. 2-3).

Tuesday, realizing don't [sic] have much time to look into the matter; or do we extend the time?

MR. PECORARO: The 60 days would run out Tuesday. I believe, according to 3.050, if you are within the window allotted, the court can extend the time.

THE COURT: If you are comfortable with that -- I don't think it's fair to ask the State to stipulate.

MR. PECORARO: I understand.

THE COURT: If you are comfortable with that, I'll extend it. It's up to you, or we'll have a hearing Tuesday.

MS. PINHOLD: Pursuant to your order yesterday, Judge, you told the State to prepare for this motion today. Pursuant to that order, I brought in a general master who has a calendar of her own to testify, and she has the most knowledge of this case, and she's present before the court today.

THE COURT: There's no motion.

MS. PINHOLD: There is a motion. It was filed today, Judge.

THE COURT: I'll extend the time.

* * *

THE COURT: I'll grant the motion for extension of time for 60 days, and we'll re-calendar the motion to mitigate in approximately 30 days, which will be -- how about September 14th?

MS. PINHOLD: Judge, I'm not going to be here September 14th.

THE COURT: Well, give me a date.

MS. PINHOLD: I'll be here at the end of that week.

THE COURT: September 17th?

MS. PINHOLD: Yes.

THE COURT: Friday, September 17th?

MS. PINHOLD: Yes.

THE COURT: Mr. Pecoraro, is that all right?

MR. PECORARO: Yes, sir.

* * *

MS. PINHOLD: The State has a request. Since the court has extended the time, the motion, the motion to mitigate itself, number two, says 'additional grounds for mitigation shall be presented orally at the time of hearing.' The State would request the court order defense counsel to at least present additional grounds prior to the motion in writing.

MR. PECORARO: This was something I did yesterday to get the motion filed in time. I will, Sir.

THE COURT: The defense will re-file his motion to mitigate in more detail." (T. 5-8).

On August 24, 1993, an additional hearing was held before the trial judge. Defense counsel, seeking to preserve Petitioner's right to pursue mitigation of sentence, requested that the court commence the mitigation hearing prior to the expiration of the 60-day period. (2ST. 4-7; 2ST. 10). At this hearing the State for the first time objected to any continuance of the motion to mitigate. The prosecution insisted that the court had to review the transcripts of the trial and make a decision prior to the expiration of the sixty (60) days. (2ST. 18). After a short recess, the trial court obtained copies of the trial transcripts from the Office of the Public Defender. The defense offered the transcripts into evidence and the court accepted the transcripts for review. (2ST. 21-23). The court announced a recess until a future date. The following occurred:

THE COURT: "Exhibit A, a composite exhibit. I think at this point, the Court will recess until a future date. Is there any other evidence that we can take up at this time?

MS. LEHNER: If I might, Judge, I realize we are doing the best we can under the circumstances with all due respect to the Court, I want to state our position clearly for the record and that is, we do not believe that this hearing has commenced, although the Court is in possession of the transcripts, it's not our position that the hearing has commenced, because we have no hearing and also I would state for the record that we are not agreeing to any continuances that the Court takes.

THE COURT: I appreciate your position. The hearing has commenced. I have commenced the hearing and we have accepted evidence and now we'll recess since it's impossible for me to read the transcripts at this time. When do you want to reconvene?

MR PECORARO: At the court's pleasure. I know we have a time set in September. I don't know if the State wants to put it over that long.

* * *

THE COURT: How about October 5th, at one o'clock, is that all right?

MR. PECORARO: That's all right.

THE COURT: Now, at this time, I would appreciate if counsels would bring to my attention those portions of the transcripts that they think I should consider." (2ST. 25-27).

On October 18, 1993, the trial court reconvened the mitigation hearing. At this hearing the State reiterated its objection to the timeliness of the mitigation proceedings. (T. 20-21). Following opening statements, several witnesses were called in support of Petitioner's motion to mitigate. The State presented witnesses in opposition to the motion. (R. 39-40; T. 29-131).[3] The following

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[3] At this hearing, Bruno Abreu testified concerning R C santeria worship and its effects on their relationship. He testified about the fact that he lost his job and that R facilitated the purchase of his gun. Abreu also testified that R mother made threats to him that he was going to pay dearly for the way he was treating her daughter. Defendant also testified about his attempts to divorce R He

day, the court entertained closing arguments. (R. 41; T. 135-174). The trial court reset the matter for November 2, 1993, to announce its decision. (T. 177-178).

On November 2, 1993, the court granted Petitioner's motion to mitigate and resentenced Petitioner to thirty (30) years imprisonment on each of the previous life sentences, to be served concurrently, followed by ten years' probation with special conditions of successful completion of Domestic Intervention Program and Anger Control. The previous terms of fifteen and five years imprisonment were ordered to be served concurrently. (R. 44-48; T. 187-189).[4] The State filed a Notice of Appeal. (R. 50).

On appeal, the Third District Court of Appeal granted the State's petition for writ of certiorari and quashed the order

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conceded that he struck R but vehemently denied the other accusations against him. (T. 30-42).

Yolanda Abreu, Defendant's mother, corroborated the testimony of Defendant's father, Oscar Abreu, that Defendant was punished as a child while working as an agricultural worker in Cuba. (T. 84). Defendant's mother explained that Defendant began to have problems at school. (T. 85). She also testified that Defendant had informed her that he wanted a divorce from his wife. (T. 86-87).

R C testified that she did "believe in the saints." (T. 88). I C also testified that she did strike Defendant with hangers, did scratch his face and may have kicked him in the groin in an effort to defend herself. (T. 101-103). C confirmed that her vaginal examination did not reveal any tears or lacerations. She also acknowledged that she did not suffer any bruises from handcuffs or any broken bones. (T. 104).

Dr. Leonard Haber's conclusions about Bruno Abreu were based only upon his testimony at the hearing. Dr. Haber did not evaluate, meet with or speak to Defendant. (T. 116). Dr. Haber explained that it is a medical probability that epileptic persons have a tendency to have violent outbursts. (T. 121).

[4] The sentencing guidelines scoresheet provided for a permitted range of 27 years to life imprisonment. (R. 49).

mitigating sentence. (App. 6)[5] The appellate court ruled that the trial court was without jurisdiction to enter an order of mitigation after the expiration of the 60-day period prescribed by Florida Rule of Criminal Procedure 3.800(b).

The Third District recognized a timely motion to mitigate had been filed, and that the hearing was commenced within the sixty-day period. (App. 2-3). Nonetheless, the appellate court ruled that the trial court was without jurisdiction to consider the motion and enter an order after the expiration of the 60-day period. (App. 3-5).

The appellate court noted, however, a conflict among the districts on this issue. The Third District wrote:

> "By contrast, the First District has held that the time for entry of an order mitigating sentence can be enlarged pursuant to Florida Rule of Criminal Procedure 3.050. State v. Golden, 382 So.2d 815, 816 (Fla. 1st DCA 1980). There, the hearing was conducted within the 60-day period but the order mitigating sentence was entered thereafter.
>
> The Second District has also allowed an order to be entered after the 60-day period had expired, where the hearing on the motion to mitigate was commenced during the 60-day limit but proceedings carried over to a date after the 60-day period had expired. Smith v. State, 471 So.2d 1347, 1348-49 (Fla. 2d DCA 1985). We certify that the decision in the instant case is in direct conflict with Smith and Golden." (App. 5-6).

Petitioner filed a Notice to Invoke Discretionary Jurisdiction. This Court entered an order postponing decision on jurisdiction and directed the filing of briefs on the merits.

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[5] The appellate court treated the State's appeal as a petition for writ of certiorari. (App. 2; App. 6).

## QUESTIONS PRESENTED

I

WHETHER A TRIAL COURT MAY CONSIDER, AND RULE ON, A MOTION FOR MITIGATION UNDER RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE, AFTER THE EXPIRATION OF THE SIXTY-DAY PERIOD PRESCRIBED UNDER THE RULE, WHERE THE MOTION HAS BEEN TIMELY FILED, THE COURT HAS COMMENCED THE HEARING ON THE MOTION WITHIN THE SIXTY-DAY PERIOD, AND AN EXTENSION HAS BEEN GRANTED UNDER RULE 3.050, FLORIDA RULES OF CRIMINAL PROCEDURE

## SUMMARY OF ARGUMENT

Petitioner submits the trial court in this case had jurisdiction to consider, and rule on, Petitioner's motion for mitigation. In the present case, Petitioner timely filed a motion for mitigation. The trial court timely commenced a hearing on the motion and granted an extension of time under Rule 3.050, Florida Rules of Criminal Procedure, to complete the hearing.

Under Rule 3.050, extensions of time for mitigation of sentences under Rule 3.800(b), Florida Rules of Criminal Procedure, are permitted where good cause is shown. In the present case, counsel was not appointed for Petitioner until the month when the sixty-day period terminated, and Petitioner was not even transported until one day before the hearing. A trial court, moreover, does not lack jurisdiction to reduce a sentence, even though the 60-day period has expired, where the judge has effectively enlarged the time during which he could reconsider defendant's sentence by having commenced the hearing on the defendant's timely motion within the 60-day time limit.

## ARGUMENT

A TRIAL COURT MAY CONSIDER, AND RULE ON, A MOTION FOR MITIGATION UNDER RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE, AFTER THE EXPIRATION OF THE SIXTY-DAY PERIOD PRESCRIBED UNDER THE RULE, WHERE THE MOTION HAS BEEN TIMELY FILED, THE COURT HAS COMMENCED THE HEARING ON THE MOTION WITHIN THE SIXTY-DAY PERIOD, AND AN EXTENSION HAS BEEN GRANTED UNDER RULE 3.050, FLORIDA RULES OF CRIMINAL PROCEDURE

The trial court in this case had jurisdiction to consider, and rule on, Petitioner's motion for mitigation. In the present case, Petitioner timely filed a motion for mitigation. The trial court timely commenced a hearing on the motion and granted an extension of time under Rule 3.050, Florida Rules of Criminal Procedure, to complete the hearing.

Rule 3.800(b), Florida Rules of Criminal Procedure, which provides, in pertinent part, as follows:

> "A court may reduce or modify... a legal sentence imposed by it within 60 days after such imposition, or within 60 days after receipt by the court of a mandate issued by the appellate court..., or within 60 days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence, or, if further appellate review is sought in a higher court or in successively higher courts, then within sixty days after the highest state or federal court to which timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance or order dismissing the appeal and/or denying certiorari..."

The Third District ruled that under Florida law a trial court loses jurisdiction to act on a motion to mitigate filed under this Rule, even where the motion was filed within the sixty days, unless the court acts within the sixty days. Interestingly, however,

while the appellate court noted that the defense relied on Rule 3.050, Florida Rules of Criminal Procedure, for an extension within the sixty-day period, the Third District did not discuss or explain why this rule was inapplicable to the cause.

Rule 3.050, Florida Rules of Criminal Procedure, permits a trial court to extend the time provided for in the Rules of Criminal Procedure for good cause shown. The Rule provides as follows:

**Rule 3.050. Enlargement of Time**

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for good cause shown may, at any time, in its discretion (1) with or without notice, order the period enlarged if a request thereof is made before the expiration of the period orginally prescribed or extended by a previous order or (2) upon motion made and notice after the expiration of the specified period, permit the act to be done when the failure to act was the result of excusable neglect; but it may not, except as provided by statute or elsewhere in these rules, extend the time for making a motion for new trial, for taking an appeal, or for making a motion for a judgment of acquittal."

Based on the foregoing, it is clear that the trial court ruled within its discretionary power to extend the time to consider and act upon Defendant's motion to mitigate. In fact, this particular Rule was cited to and relied upon by Defendant below. (R. 35; T. 3; T. 5). This rule permits extensions of time for mitigation of sentences under Rule 3.800(b), Florida Rules of Criminal Procedure. State v. Golden, 382 So.2d 815 (Fla. 1st DCA 1980).[6]

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[6] Interestingly, Rule 3.050 specifically notes in which cases extensions of time are not allowed unless otherwise provided by statute or rule. The rule excludes extensions for motions for new trial, for taking an appeal, or for making a motion for a

Clearly, good cause was shown to the trial court. Counsel was not appointed for Petitioner until August, 1993, when the sixty-day period terminated. Petitioner was not even transported until one day before the hearing of August 20, 1993, (T. 3-4), despite defense counsel's immediate efforts to have him transported shortly after his appointment in the case. (R. 33-34). As such, counsel for Petitioner could not even consult with him on the motion to mitigate until the day before the first hearing. (T. 3-4).

Moreover, the trial court **did in fact begin the hearing within the sixty day period, on August 24, 1993**, admitting evidence for further review. (See 2ST. 21-25). A trial court does not lack jurisdiction to reduce a sentence, even though the 60-day period has expired where the judge has effectively enlarged the time during which he could reconsider defendant's sentence by having commenced the hearing on the defendant's timely motion within the 60 day time limit. Smith v. State, 471 So.2d 1347 (Fla. 2d DCA 1985); State v. Golden, supra. See also Carter v. State, 608 So.2d 562, 563 n.1 (Fla. 1st DCA 1992)(where the trial court holds a hearing within the time period, but enters an order thereafter, it does not lose jurisdiction to rule on a motion to mitigate).[7]

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judgment of acquittal. Motions for mitigation under Rule 3.800(b) are not included in this exclusion.

[7] In its brief before the Third District, the State relied on State v. Smith, 360 So.2d 21 (Fla. 4th DCA), cert. den., 366 So.2d 885 (Fla. 1978), in support of its argument that a trial court may not toll the time limitations provided in Rule 3.800(b), Florida Rules of Criminal Procedure. However, in State v. Smith, supra, the trial court did not schedule a hearing on the defendant's timely filed motion to mitigate until well after the 60-day period had expired. As such, the trial court had already

The Third District relied on its decision in Evans v. State, 225 So.2d 548 (Fla. 3d DCA), cert. den., 229 So.2d 261 (Fla. 1969), cert. den., 397 U.S. 1053 (1970), in support of its conclusion. In Evans, the defendant had timely filed his motion to mitigate and argued that, as such, the trial court could hold hearings on the motion and act upon it at any time. The appellate court rejected this position, noting that it would permit an "indefinite supervision by a trial court over all legal sentences it imposes." Id., 225 So.2d, at 550. In its current opinion, the Third District cited this Court's denial of certiorari in Evans, where this Court ruled that the appellate court had correctly concluded that the trial court proceeded without jurisdiction. (App. 4).

In Evans, however, the courts did not consider either the commencement of a mitigation hearing within the sixty-day period, nor a proper extension of time, as permitted under current Rule 3.050, Florida Rules of Criminal Procedure. Moreover, in Evans, the trial court had not mitigated the sentence at issue, but had vacated the sentence. The Third District found that the trial

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lost jurisdiction when it attempted to toll the time limitations of Rule 3.800(b). Id., at 22. On the other hand, in Smith v. State, 471 So.2d 1347 (Fla. 2d DCA 1985), the Second District ruled that where the hearing on the motion to mitigate has commenced within the sixty day period the trial court does not lose jurisdiction to act on the motion. Id., at 1348-49. Here, the trial judge began the hearing and took the trial transcripts into evidence. The court, moreover, wanted the opportunity to review these extensive trial transcripts in order to give careful consideration to the Defendant's motion and the State's opposition thereto. As in Smith, supra, Defendant should not be denied "full and fair consideration of a motion that potentially could have a substantial bearing on the time he would be imprisoned." Id., at 1349.

court had, therefore, clearly acted without statutory authority. Id., 225 So.2d, at 550.

Similarly, the Third District's reliance on this Court's decision in Sanchez v. State, 541 So.2d 1140 (Fla. 1989), is misplaced. (App. 5). In Sanchez, this Court ruled that an adjudication of guilty may be vacated only within sixty days of imposition. The defendant in Sanchez had moved to mitigate his term of probation two years after his adjudication of guilt. Thus, the trial court did not commence a hearing within the sixty-day period prescribed under Rule 3.800(b), or extend the time pursuant to a request therefor under Rule 3.050.[8]

In view of the foregoing, it must be concluded that the lower court applied an erroneous interpretation of the Rule 3.800(b), Florida Rules of Criminal Procedure. The appellate court disregarded the impact of Rule 3.050, Florida Rules of Criminal Procedure and improperly dismissed the significance of the trial court's commencement of the mitigation hearing within the sixty-day period.

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[8] The remaining cases cited by the Third District in support of its decision likewise did not involve the timely filing of a motion to mitigate, the timely commencement of a mitigation hearing, and an extension under Rule 3.050, as occurred in this case. (App. 5).

## CONCLUSION

Based on the foregoing, petitioner requests this Court quash the decision of the Third District Court of Appeal decision in this cause and direct that Petitioner's sentence be affirmed as reduced by the trial court.

Respectfully submitted,

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By: _____
J. RAFAEL RODRIGUEZ
FLA. BAR NO. 302007

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Elliot B. Kula, Esq., the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, P.O. Box 013241, Miami, Florida, 33128, on this 21st day of March, 1995.

_____
J. RAFAEL RODRIGUEZ

# APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1995

THE STATE OF FLORIDA, **

Appellant/petitioner, **

vs. ** CASE NO. 93-2676

BRUNO ABREU, **

Appellee/respondent. **

Opinion filed February 8, 1995.

A Writ of Certiorari to the Circuit Court for Dade County, W. Thomas Spencer, Judge.

Robert A. Butterworth, Attorney General, and Michele A. Smith and Elliot Kula, Assistant Attorneys General, for appellant/petitioner.

Bennett H. Brummer, Public Defender, and J. Rafael Rodriguez, Special Assistant Public Defender, for appellee/respondent.

Before BASKIN, COPE and GREEN, JJ.

COPE, Judge.

The State appeals an order granting a motion to mitigate. The question presented is whether the trial court had jurisdiction to enter an order of mitigation after the expiration of the 60-day

period prescribed by Florida Rule of Criminal Procedure 3.800(b). We answer the question in the negative, treat the appeal as a petition for writ of certiorari, and quash the trial court order.

Defendant was convicted of multiple crimes and sentenced to life imprisonment. After appellate review in this court defendant petitioned for discretionary review in the Florida Supreme Court, which was denied June 25, 1993. See Abreu v. State, 610 So. 2d 564 (Fla. 3d DCA 1992), review denied, 623 So. 2d 493 (Fla. 1993).[1]

On August 20, 1993 a special assistant public defender filed a timely motion to mitigate sentence. This was four days before the expiration of the 60-day period allowed by Rule 3.800(b) for mitigation of sentence. The original sentencing judge had rotated out of the criminal division and the motion to mitigate fell before a successor judge. Relying on Florida Rule of Criminal Procedure 3.050, defense counsel also moved for a lengthy enlargement of time to prepare for the hearing on the motion to mitigate because he had only recently been appointed and needed time to consult with the defendant. The trial court granted the extension of time to a date beyond the 60-day period allowed by Rule 3.800(b).

On August 24, 1993, the last day of the 60-day period allowed

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[1] This court affirmed defendant's convictions but remanded with directions that the defendant's mandatory minimum sentences should run concurrently, not consecutively. 610 So. 2d at 565. When defendant petitioned the Florida Supreme Court for discretionary review, there was no stay of this court's mandate. Consequently, the mandate issued in February, 1993 and the trial court entered an order correcting defendant's mandatory minimum sentences in March, 1993.

by Rule 3.800(b), there was another hearing on the motion to mitigate. Relying on Smith v. State, 471 So. 2d 1347 (Fla. 2d DCA 1985), and State v. Golden, 382 So. 2d 815 (Fla. 1st DCA 1980), defendant requested that the trial court commence the hearing on the motion to mitigate and then recess until a future date for the completion of proceedings. The trial court granted the defendant's request and commenced the hearing. At that time the defendant moved the trial transcript into evidence. The court requested the parties to designate those portions of the transcript which the court should read in connection with the motion to mitigate. The court then recessed the hearing to a future date.[2]

On October 18, well after the expiration of the 60-day period allowed by Rule 3.800(b), the court reconvened the mitigation hearing and took evidence from witnesses offered by the defense and the prosecution. On November 2, 1993 the trial court entered an order granting the motion to mitigate. Under the sentencing guidelines, the recommended range was life and the permitted range was 27 years to life. The trial court mitigated the life sentences to 30 years.

The State has appealed, contending that the trial court was

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[2] At the August 20 hearing the State did not take a position on the defendant's motion for extension of time. At the August 24 hearing the State took the position that the time should be extended if the motion were referred back to the original sentencing judge for a ruling. However, the State indicated that if the motion was to be heard by the successor judge then the State objected to any extension of time.

without jurisdiction to enter a mitigation order once the 60-day period allowed by Rule 3.800(b) had expired. We agree.

In State v. Evans, 225 So. 2d 548 (Fla. 3d DCA), cert. denied, 229 So. 2d 261 (Fla. 1969), cert. denied, 397 U.S. 1053 (1970), this court said:

> The respondent contends and urges us to hold, that if a motion to mitigate sentence is filed within 60 days of the date a sentence is pronounced by a trial court, that court has the power to hold hearings on the motion and act upon it at any time. The plain language of § 921.25 and Rule 1.800(b) prohibits us from announcing such a rule. Respondent's construction of the statute and rule would permit indefinite supervision by a trial court over all legal sentences it imposes. Such supervision does not accord with reason or public policy. Under our tripartite system of government there must come a time when the judiciary's power to reduce a lawful sentence ends and vests in the executive department. We think the statute and rule prescribe that time.

225 So. 2d at 550 (citations omitted). The Rule 1.800(b) referred to in Evans is currently renumbered as Rule 3.800(b). In Evans, as in the present case, the motion to mitigate had been filed within the 60-day period, but the order granting mitigation was not entered until after the 60-day period had expired.

After this court rendered its decision in Evans, review was sought in the Florida Supreme Court. That court denied review with an opinion which states, in part, "the District Court of Appeal correctly concluded that the trial court proceeded without jurisdiction." Evans v. State, 229 So. 2d 261, 261 (Fla.

1969)(emphasis added);[3] see also Sanchez v. State, 541 So. 2d 1140 (Fla. 1989).[4]

Subsequent to the Evans decision, this court has consistently held that:

> A trial court lacks the jurisdiction to mitigate a legal sentence after the above sixty day periods [provided in Florida Rule of Criminal Procedure 3.800(b)] have elapsed . . . .
>
> . . . The sixty day time periods under Fla.R.Crim.P. 3.800(b) had elapsed at the time the mitigation orders were entered. Since this is a jurisdictional matter, we must of necessity reject the defendants' contentions which seek to excuse the trial court's delay in mitigating the sentences.

State v. Sotto, 348 So. 2d 1222, 1223-24 (Fla. 3d DCA 1977), cert. denied, 359 So. 2d 1219 (Fla. 1978); accord State v. Adirim, 376 So. 2d 464 (Fla. 3d DCA 1979); State v. Rodriguez, 326 So. 2d 245 (Fla. 3d DCA 1976); see also State v. Smith, 360 So. 2d 21, 22 (Fla. 4th DCA), cert. denied, 366 So. 2d 885 (Fla. 1978); Saver v. State, 267 So. 2d 42 (Fla. 4th DCA 1972).

By contrast, the First District has held that the time for entry of an order mitigating sentence can be enlarged pursuant to Florida Rule of Criminal Procedure 3.050. State v. Golden, 382 So.

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[3] Technically it would appear that the Florida Supreme Court's statement on this point is dictum, since the court went on to rule that it was without jurisdiction under Article V, section 4 of the Florida Constitution of 1968. 229 So. 2d at 261.

[4] As we interpret Sanchez, the court there stated that the motion under Rule 3.800(b) must be filed, and the trial court must enter its order, within the 60-day limitation set forth in the Rule. 541 So. 2d at 1141-42.

2d 815, 816 (Fla. 1st DCA 1980). There, the hearing was conducted within the 60-day period but the order mitigating sentence was entered thereafter.

The Second District has also allowed an order to be entered after the 60-day period had expired, where the hearing on the motion to mitigate was commenced during the 60-day limit but proceedings carried over to a date after the 60-day period had expired. Smith v. State, 471 So. 2d 1347, 1348-49 (Fla. 2d DCA 1985). We certify that the decision in the instant case is in direct conflict with Smith and Golden.

The State has proceeded by way of appeal in this matter. In prior cases, certiorari has been the procedure employed. See State v. Adirim, 376 So. 2d at 464-65; State v. Sotto, 348 So. 2d at 1223, 1224; State v. Rodriquez, 326 So. 2d at 246; State v. Evans, 225 So. 2d at 548, 551. Accordingly, we treat the appeal as a petition for writ of certiorari. We grant the petition and quash the order mitigating sentence.

Certiorari granted; direct conflict certified.