047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,231

BRUNO ABREU,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

	PAGE
INTRODUCTION.	1
STATEMENT OF THE CASE AND FACTS.	2-6
QUESTION PRESENTED.	7
SUMMARY OF THE ARGUMENT.	8
ARGUMENT.	9-17
A TRIAL COURT LACKS JURISDICTION TO CONSIDER OR RULE ON A MOTION FOR MITIGATION UNDER RULE 3.800(B), FLA. R. CRIM. P. AFTER THE EXPIRATION OF THE SIXTY DAY PERIOD PRESCRIBED UNDER THE RULE. (RESTATED)	**9**
CONCLUSION.	18
CERTIFICATE OF SERVICE.	18

TABLE OF CITATIONS

CASES	PAGE
Carter v. State, 608 So. 2d 562 (Fla. 1st DCA 1992).	9
Collins v. State, 343 So. 2d 680 (Fla. 2nd DCA 1977).	10
De La Paz v. State, 358 So. 2d 1093 (Fla. 3rd DCA 1978).	10
Dominguez v. State, 556 So. 2d 499 (Fla. 1st DCA 1990).	9
Grosse v. State, 511 So. 2d 688 (Fla. 4th DCA 1987), rev. denied, 519 So. 2d 987 (Fla. 1988).	9,11,15
Jefferson v. State, 320 So. 2d 827 (Fla. 4th DCA 1975).	10
Moss v. State, 330 So. 2d 742 (Fla. 1st DCA 1976).	10
Sanchez v. State, 541 So. 2d 1140 (Fla. 1989).	9
Sayer v. State, 267 So. 2d 42 (Fla. 4th DCA 1972).	10
Smith v. State, 471 So. 2d 1347 (Fla. 2nd DCA 1985).....	6
Sotto v. Wainwright, 601 F. 2d 184 (5th Cir. 1979).	10
State v. Adirim, 376 So. 2d 464 (Fla. 3d DCA 1979).	10,15
State v. Allen, 553 So. 2d 176 (Fla. 4th DCA 1989).	15
State v. Brown, 308 So. 2d 655 (Fla. 1st DCA 1975).	10

State v. Evans,
225 So. 2d 548 (Fla. 3rd DCA 1969),
cert. denied, 229 So. 2d 261 (Fla. 1969),
cert. denied, 397 U.S. 1053, 90 S. Ct. 1393,
25 L. Ed. 2d 668 (1970)..... 10,12,15

State v. Golden,
382 So. 2d 815 (Fla. 1st DCA 1980)..... 6,9,12,14-17

State v. Lapica-Falcon,
519 So. 2d 57 (Fla. 2nd DCA 1988)..... 9-10

State v. Mancil,
354 So. 2d 1258 (Fla. 2nd DCA 1978)..... 10

State v. Migdahl,
353 So. 2d 635 (Fla. 3rd DCA 1977)..... 10

State v. Rodriguez,
326 So. 2d 245 (Fla. 3rd DCA 1976)..... 10

State v. Smith,
360 So. 2d 21 (Fla. 4th DCA 1978),
cert. denied, 366 So. 2d 885 (Fla. 1978)..... 10-11,14-17

State v. Smith,
471 So. 2d 1347 (Fla. 2nd DCA 1985)..... 9

State v. Sotto,
348 So. 2d 1222 (Fla. 3rd DCA 1977),
cert. denied, 359 So. 2d 1219 (Fla. 1978)..... 10

State v. Sutton,
371 So. 2d 717 (Fla. 2nd DCA 1979)..... 10

Ware v. State,
231 So. 2d 872 (Fla. 3rd DCA 1970)..... 10

Wells v. State,
495 So. 2d 1221 (Fla. 1st DCA 1986)..... 10

Wilson v. State,
487 So. 2d 1130 (Fla. 1st DCA),
rev. denied, 496 So. 2d 143 (Fla. 1986)..... 10

OTHER AUTHORITIES:

Rule 1.800(b), Fla. R. Crim. P..... 12

Rule 3.050, Fla. R. Crim. P..... 12-14

Rule 3.191. Fla. R. Crim. P..... 11

Rule 3.800(b), Fla. R. Crim. P.....6-7,9-11,14-17

INTRODUCTION

Respondent, the **STATE OF FLORIDA,** was the prosecution in the trial court and the Appellant in the District Court of Appeal, of Florida, Third District. The Petitioner, **BRUNO ABREU,** was the defendant in the trial court and the Appellee in the District Court of Appeal. The parties will be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as "defendant" and Respondent may also be referred to as the "State".

The symbol "App." will be used to designate the Appendix to this brief. The following symbols will be used:

"R"	Record on Appeal.
"T"	Transcript of proceedings below.
"ST"	Supplemental transcript of proceedings below.

All emphasis has been added by Appellant unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the Case and Facts as substantially correct, with the following additions and corrections:

At the hearing on the defendant's motion to mitigate on August 24, 1993, counsel for the defendant, in summarizing the proceedings for the court, noted that:

> Therefore, again, since we're specially set, holding that the hearing has been commenced within that time period and it's been requested that this matter be heard by Judge Ramirez who was the trial judge, that at least Mr. Abreu has done everything he could to file his motion timely and to have the matter heard and at this point in time could reserve any objections that we have to the transferring of the matter to Judge Ramirez, which would put it beyond the sixty days, in fact, the Court's prior ruling extending the time of sixty days was void because the Court cannot extend the jurisdictional limit. That's all.
>
> * * * *
>
> **THE COURT:** What is the motion we are traveling on, pro se motion to mitigate?
>
> **MR. PECORARO:** The pro se motion to mitigate has never been located by myself. I did file a motion to mitigate, I believe August 19th or August 20th as reflected by the file and also filed a motion to extend time.
>
> What we're here on, what we're trying to do is hear the motion to mitigate. That's what we're acting on, yes sir.
>
> **THE COURT:** Do you have a copy?
>
> **MR. PECORARO:** The Court saw that last week and granted an extension of time. The only thing,

> after reviewing annotations in case law that I had some concern that the Court may not be able to extend that jurisdictional limit and preferring to err on the side of caution, I ask that the matter be set today within the sixty days to preserve Mr. Abreu's rights.

(2ST. 6-7). (Emphasis supplied).

At the hearing on the motion to mitigate, Appellee denied whipping R C with the gun, hangers, vacuum hose, and sticking the gun into her vagina. (T. 43). Appellee testified that he was threatened and tortured mentally as a child and was diagnosed an epileptic, but did not receive any treatment for epilepsy when he migrated to America. (T. 25). According to Appellee, he met R and within one month, was married to her. Shortly after their marriage, he found out she was involved in Santeria (T. 25) and practiced rituals in their apartment. From then on, Appellee began to feel very nervous. R allegedly pressured him to buy a gun (R. 31) and because he was not making enough money. (T. 32) The end of April, she accused him of giving her herpes. Appellee claimed R gave him pills she had obtained from her mother, to help him sleep. (R. 33). Appellee admitted fighting R and giving her a black eye, but claims R cut his face during the fight. (R. 36, 38). Appellee told the court he was charged with things he never did or even thought of doing. (R. 47).

Margaret Rosenbaum, a former Assistant State Attorney on the case (R. 47), testified that during her investigation, she

did not find any evidence that R practiced Santeria, or was prone to seizures or violent outbursts. (T. 48). She requested R to be examined by Dr. Harber because R was a "classic case of battered woman syndrome and post traumatic stress." R had been held prisoner for five days, had a gun placed in her vagina, forced oral sex, had a gun placed in her mouth to force sex, was beaten from the top of her head to the tip of her toes, and forced to have sexual intercourse with Appellee. (T. 51-52). Her investigation led her to believe Appellee was the one who controlled the relationship, contrary to Appellee's story. (T. 53). Many different pleas were offered to Appellee, the final offer was nine years because R was terrified of going to court and reliving the experience, and the state's investigator had not subpoenaed an officer from Hialeah Police Department.

Appellee's father testified that he disciplined Appellee as a child and that Appellee was obligated to go to the camps, just like every other child in Cuba. (R. 75). When he could not do the work in the camp, he was sometimes tied up or made fun of. (R. 76). Appellee was diagnosed with epilepsy shortly after his eleventh birthday, but Appellee did not receive treatment after he came to America. From the age of nineteen until twenty-five, when he married R , Appellee never had seizures. (R. 81-82).

Appellee's mother told the court that if "people in this country that sometimes kill eight or ten people are still given a chance in society, I would like my son to have that chance in society." (T. 87).

R C testified that she never had a history of psychiatric disorders, and was never violent against Appellee. She testified that before their marriage, Appellee was "a little strong" and very jealous, but she thought it would go away. After their marriage he isolated her from her family and friends, nobody could visit or call her house, he became violent and began beating her. (T. 89). Appellee took her to work and back, had control of her credit cards and followed her everywhere. He would cry and say that he was sorry each time after he had beaten her. (T. 90). She wanted and even tried to leave Appellee but to no avail. (R. 91-93). R testified that she felt safe because Appellee was jail. (R. 96-97, 108) and denied giving Appellee any pills. (R. 99).

Dr. Leonard Harber testified that Re suffered from battered woman syndrome post-traumatic stress disorder. (R. 114) and from Appellee's testimony, he concluded Appellee was as R described, a person who blames others for everything. This inability to accept responsibility resulted in Appellee's continuing excuses - blaming Santeria, R , his upbringings, and even his mother for not letting him get a divorce. (T. 116-

117). He concluded that Appellee's epilepsy had no connection to the case, especially since Appellee never had any symptoms in all those years. (T. 117).

Dr. Lazaro Garcia testified that since Appellee did not have any prior criminal history or violent outbursts, he has the capacity to become a productive member of society. (T. 127) that Appellee took some responsibility for his actions although he tried to minimize them to avoid going to jail, and that Appellee was free from any psychiatric disorders. (T. 128).

On Appeal, the Third District Court of Appeal, treating the States' appeal as a petition for writ of certiorari, quashed the lower court's order mitigating sentence. The Third District held that the trial court lacked jurisdiction to mitigate defendant's sentence after the expiration of the sixty (60) day period prescribed by Rule 3.800(b), Fla. R. Crim. P., and certified its decision as in direct conflict with Smith v. State, 471 So. 2d 1347 (Fla. 2nd DCA 1985), and State v. Golden, 382 So. 2d 815 (Fla. 1st DCA 1980).

Petitioner filed a Notice to Invoke Discretionary Jurisdiction, and this court, postponing decision on jurisdiction, directed that the parties file briefs on the merits.

QUESTION PRESENTED

WHETHER A TRIAL COURT HAS JURISDICTION TO 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. (RESTATED).

SUMMARY OF THE ARGUMENT

The trial court in this case was without jurisdiction to mitigate Petitioner's sentence after the sixty (60) day period prescribed by the Rule had expired. Statutes of mitigation are a privilege or grace to a convicted defendant and are to be strictly construed, and Rule 3.050 should not be deemed applicable to discretionary "grace" sentencing statutes such as the one at issue.

Furthermore, the fact that a hearing technically commenced on defendant's motion on the sixtieth day below should not be deemed dispositive of the instant appeal, as the "hearing" below was nothing more than a "sham", clearly commenced by the lower court for the sole purpose of circumventing the jurisdictional requirements of Rule 3.800(b). The lower court's attempted "end run" around the jurisdictional time limitations of the Rule must be rejected by this Court.

Finally, the instant case is devoid of the unique equitable considerations present in Smith and Golden, and neither case should be interpreted to create a broad, general exception to the time prescriptions of the rule. As Petitioner has offered no argument, nor advanced any legitimate reason to overturn both the legislative intent and public policy considerations inherent in strict construction of Rule 3.800(b), the conclusions and ruling of the Third District in quashing the lower court's order of mitigation were correct and must be upheld by this Court.

ARGUMENT

A TRIAL COURT LACKS JURISDICTION TO CONSIDER OR RULE ON A MOTION FOR MITIGATION UNDER RULE 3.800(B), FLA. R. CRIM. P. AFTER THE EXPIRATION OF THE SIXTY DAY PERIOD PRESCRIBED UNDER THE RULE. (RESTATED).

The trial court in this case, as properly found the Third District Court of Appeal, (App. A) was without jurisdiction to mitigate Petitioner's sentence, where it did so after the sixty (60) day period prescribed by the Rule had expired. Fla. R. Crim. P., 3.800(b) provides in pertinent part that:

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

With the sole exceptions of State v. Golden, 382 So. 2d 815 (Fla. 1st DCA 1980), and State v. Smith, 471 So. 2d 1347 (Fla. 2nd DCA 1985), the appellate courts of Florida have consistently held that the limitation of time provided in Rule 3.800(b) for mitigation of sentence is jurisdictional. Carter v. State, 608 So. 2d 562 (Fla. 1st DCA 1992); Dominguez v. State, 556 So. 2d 499 (Fla. 1st DCA 1990); Sanchez v. State, 541 So. 2d 1140 (Fla. 1989); Grosse v. State, 511 So. 2d 688 (Fla. 4th DCA 1987), rev. denied, 519 So. 2d 987 (Fla. 1988); State v.

Lapica-Falcon, 519 So. 2d 57 (Fla. 2nd DCA 1988); Wells v. State, 495 So. 2d 1221 (Fla. 1st DCA 1986); Wilson v. State, 487 So. 2d 1130 (Fla. 1st DCA), rev. denied, 496 So. 2d 143 (Fla. 1986); State v. Sutton, 371 So. 2d 717 (Fla. 2nd DCA 1979); Sotto v. Wainwright, 601 F. 2d 184 (5th Cir. 1979); State v. Adirim, 376 So. 2d 464 (Fla. 3d DCA 1979); State v. Smith, 360 So. 2d 21 (Fla. 4th DCA 1978), cert. denied, 366 So. 2d 885 (Fla. 1978); State v. Mancil, 354 So. 2d 1258 (Fla. 2nd DCA 1978); De La Paz v. State, 358 So. 2d 1093 (Fla. 3rd DCA 1978); State v. Sotto, 348 So. 2d 1222 (Fla. 3rd DCA 1977), cert. denied, 359 So. 2d 1219 (Fla. 1978); Collins v. State, 343 So. 2d 680 (Fla. 2nd DCA 1977); State v. Migdahl, 353 So. 2d 635 (Fla. 3rd DCA 1977); Moss v. State, 330 So. 2d 742 (Fla. 1st DCA 1976); State v. Rodriguez, 326 So. 2d 245 (Fla. 3rd DCA 1976); Jefferson v. State, 320 So. 2d 827 (Fla. 4th DCA 1975); State v. Brown, 308 So. 2d 655 (Fla. 1st DCA 1975); Sayer v. State, 267 So. 2d 42 (Fla. 4th DCA 1972); Ware v. State, 231 So. 2d 872 (Fla. 3rd DCA 1970); State v. Evans, 225 So. 2d 548 (Fla. 3rd DCA 1969), cert. denied, 229 So. 2d 261 (Fla. 1969), cert. denied, 397 U.S. 1053, 90 S. Ct. 1393, 25 L. Ed. 2d 668 (1970).

Pursuant to this litany of case law, even if a motion pursuant to Rule 3.800(b) is filed within the sixty day period prescribed therein, the trial court loses jurisdiction to act on the motion if such action does not also occur within that time period. As stated in Adirim, supra "[E]ven though this may

appear to work a hardship on the respondent, it should be remembered that statutes of mitigation are a privilege or grace to a convicted defendant and are to be strictly construed. (Emphasis supplied). See also Grosse, supra.

In the instant case, the Florida Supreme Court denied review on June 25, 1993. On August 20, 1993, Petitioner requested an extension of time on his motion to mitigate sentence, and the court granted a sixty (60) day extension until September 17, 1993. The court then postponed this hearing until October 18, 1993 and then on November 2, 1993, it issued an order mitigating Appellee's sentence. The State contends that the trial court had no authority to mitigate Appellant's sentence nearly five months late. Rule 3.800(b) does not provide for any extensions or exceptions, meaning that the legislature intended any modification or mitigation to take place within the sixty (60) day time frame. For example, Fla. R. Crim. P. 3.191, Florida's speedy trial rule, requires that a person charged with a crime be brought to trial within ninety (90) days. Subsection (d)(2), however, allows the time period to be extended "provided the period of time sought to be extended has not expired at the time the extension was procured." The legislature explicitly inserted this language to create the right to extensions under the speedy trial rule. Since rule 3.800(b) does not contain this language, the legislature did not intend to create the right to extensions of time.

As did the courts in Smith and Golden, supra, Petitioner argues the applicability of Rule 3.050, Fla. R. Crim. P., to a motion to mitigate under Rule 3.800(b). However, the reasoning of the Third District in Evans, supra, adopted in its opinion in this cause, (App. A), fully supports Respondent's position that Rule 3.050 should not be deemed applicable to discretionary "grace" sentencing statutes such as the one at issue, as follows:

> 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 statue and rule prescribe that time. (Emphasis supplied).

225 So. 2d at 550 (citations omitted). [1]

The court, in its opinion, (App. A), went on to note that:

> In Evans, as in the present case, the motion to mitigate had been filed within the 60 day

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[1] Rule 1.800(b), referred to in Evans, is the current Rule 3.800(b).

> 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, (Fla. 1969)(emphasis added); see also Sanchez v. State, 541 So. 2d 1140 (Fla. 1989)(Text of footnotes omitted, see App. A).

Petitioner further argues that "good cause" sufficient to justify the applicability of Rule 3.050, was shown below, because Petitioner was only transported one day before his August 20, 1993 mitigation hearing date. However, the record further reflects that defense attorney Pecoraro was appointed to represent Petitioner several weeks prior to August 24, 1993, (T. 3-4) undisputedly the 60th day under the rule herein, (T. 3, 2ST. 6), that Mr. Pecoraro had spoken to the defendant prior to the hearing)(T. 3, 2ST. 14), that Mr. Pecoraro was fully versed in both the procedural history of the case as well as the grounds for the motion to mitigate (2ST. 4-20), that Mr. Pecoraro had spoken with defendant's family, (2ST. 8-9), and had "reviewed the file extensively," (2ST. 19) including several if not all of the trial transcripts. (2ST. 19). Indeed, at the outset of the hearing on August 19, 1993, Mr. Pecoraro stated that he was prepared to argue the motion to mitigate at that time. (1ST. 3). The real reason for the failure to timely proceed below was the mitigation hearing court's desire to review the trial transcripts in the face of the original

sentencing judge's disinclination to hear the motion, despite the parties request that he do so. (2ST. 16-20). On the basis of this record, Petitioner cannot rely on either defendant's late transport, nor the recent appointment of defense counsel, to establish "good cause" under Rule 3.050 for extending the hearing beyond its jurisdictional sixty day period, which Respondent submits rendered its mitigation of sentence a nullity.

Furthermore, Respondent submits that the significance of the fact that a hearing technically commenced on defendant's motion on the sixtieth day below has been greatly overstated by Petitioner, should not be deemed dispositive of the instant appeal, and indeed, should be disregarded by this Court under the circumstances of this case. There can be no doubt that the lower court commenced this "hearing', in which it did nothing more than receive and accept defendant's trial transcripts into evidence over the State's objection, (2ST. 21-25) for the sole purpose of creating the procedural scenario deemed permissible in Smith and Golden, supra. (2ST. 6, 19-25). Based on these cases, the lower court clearly believed that it could circumvent the jurisdictional requirements of Rule 3.800(b) by technically "commencing" a hearing, then promptly recessing to a later date, and it did just that. (2ST. 21-25). As such, the "hearing" below was nothing more than a "sham", adding further support to Respondent's contention, adopted by the Third District (App. A)

that the jurisdictional time limitations of Rule 3.800(b) must be strictly construed to eliminate such procedural ploys by the courts. Evans, Adirim, Grosse, supra. As stated in State v. Allen, 553 So. 2d 176 (Fla. 4th DCA 1989) in reversing the lower court's downward departure sentence which was disguised by the court as a motion to mitigate upon its invitation to the defense to move for mitigation after imposition of sentence:

> Adverting to the merits of the order being reviewed, we believe it would constitute a bad precedent to approve the procedural device used to reach what the trial judge no doubt considered to be the appropriate sentence in this case. To place the imprimatur of this court on the use of Rule of Criminal Procedure 3.800(b) to effect a lesser sentence than that authorized by the sentencing guidelines promulgated pursuant to Florida Rule of Criminal Procedure 3.701 would have a deleterious effect upon the present strictures inherent in the guidelines by allowing an "end run" around the recommended sentence through the exercise of the discretion allowed in 3.800(b).

at p. 177.

In the case at bar, the lower court's attempted "end run" around the jurisdictional time limitations of Rule 3.800(b) must be likewise acknowledged and rejected by this Court.

Finally, Respondent submits that neither Smith nor Golden should be interpreted to create the broad jurisdictional exception urged by Petitioner, as both cases involved "unusual" factual situations which were emphasized by their respective

courts in their arguably limited rulings. The Smith court recognized the fact specific, and therefore limited nature of the ruling in Golden, in the following analysis:

> Generally, a court has no jurisdiction to modify a legal sentence after the passage of sixty days from sentencing. State v. Sutton, 371 So. 2d 717 (Fla. 2nd DCA 1979); Fla. R. Crim. P. 3.800(b). In the unusual circumstances presented by this case, however, the trial judge effectively enlarged the time during which he could reconsider Smith's sentence by having commenced the hearing on Smith's timely motion within the sixty day limit. The First District has so held under similar circumstances in State v. Golden, 382 So. 2d 815 (Fla. 1st DCA 1980). In Golden, the trial judge held a hearing within the time limit set forth in Rule 3.800(b), and the state agreed that the court could enter its order modifying the defendant's sentence at the time scheduled for the trial of other charges against the defendant, in spite of the fact that by that date Rule 3.800(b)'s "jurisdictional" limit had been exceeded. Although the State subsequently withdrew its consent, the trial court nevertheless modified the sentence, and the First District, referring to Rule 3.050 of the Florida Rules of Criminal Procedure, which generally permits the enlargement of time, affirmed.
>
> The facts presented here disclose that, Smith's position is even stronger than was Golden's. Smith timely moved for a reduction of his sentence, the hearing was begun, and through no fault of Smith's the hearing was reset before another judge who refused to hear the motion. Circumstances beyond Smith's control precluded the timely consideration of his motion. Furthermore, the only reason appearing in the record to support the denial of Smith's motion is the judge's impression that he lacked jurisdiction. This is not to say that the judge would otherwise have modified the sentence; rather, it is our opinion that Smith, under these particular circumstances, should not have been denied full and fair consideration of a motion that potentially could have a substantial bearing on the time he would be imprisoned.

> Accordingly, to avert the possibility that Smith might suffer an injustice resulting from the sentencing judge's good faith, but erroneous, impression that he was powerless to act, we grant the petition for writ of certiorari. (At 1348-1349).

It is thus immanently clear that the instant case is devoid of the unique equitable considerations present in Smith and Golden, in which hearings on the defendant's motions were timely commenced in good faith and ruled upon outside of the jurisdictional limits not solely because hearings had commenced in those cases, but rather to avoid rendering a blatant injustice to blameless defendants who had made every attempt to comport with the dictates of Rule 3.800(b). It is clear that the fact that hearings had commenced in those cases was not the dispositive factor, and neither Smith nor Golden should be interpreted to create a broad, general exception to the time prescriptions of the rule, but must be construed as two isolated exceptions created to remedy extreme injustice, which is certainly not present here. To the extent that Smith and Golden can be construed to create a "hearing" exception to the rule, they should be disapproved by this court. As Petitioner has offered no argument, nor advanced any legitimate reason to overturn both the legislative intent and public policy considerations inherent in strict construction of the Rule 3.800(b) a construction consistently followed by the Florida courts, Respondent submits that the conclusions and ruling of the Third District in quashing the lower court's order of mitigation were correct and must be upheld by this Court.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Respondent requests that the decision of the Third District Court of Appeal quashing the lower court's order mitigating Petitioner's sentence be upheld, and Petitioner's original sentence be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **J. RAFAEL RODRIGUEZ**, Specially Appointed Public Defender, 6367 Bird Road, Miami, Florida 33155 on this 13th day of April, 1995.

JONI B. BRAUNSTEIN
Assistant Attorney General

APPENDIX A

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 . . . .
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> . . . 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. Rodriguez, 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.