IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 90,174

JOSEPH SAL MANCINO,
A/K/A JOSEPH SAL MACKINO,
A/K/A JOSEPH SAL MACHINO,
A/K/A PAUL NICKOLINO DELUCCA,
A/K/A PAUL NICOLINO RENO,

Respondent.

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

[Preliminary Statement: It should be noted that the petitioner (through the Sate Attorney's Office or the Attorney General's Office) was not represented at either the trial court level when the respondent's Motion To Correct Illegal Sentence was summarily denied by the trial court or at the appellate level when the Second District Court of Appeals summarily disposed of the **case** without briefs pursuant to Fla. R. App. Pro 9.140(g).

The undersigned counsel would advise this court that he personally reviewed the original court file in this **case,** which is now on microfilm, and can advise this court that the original plea and/or sentencing colloquy were never transcribed.]

Documentation from the record on appeal reflects that the Respondent, Joseph Sal Mancino, **was** charged by information in case CRC83-04651 with, among other offenses, the crime of armed burglary (See appendix of respondent's Motion To Correct Illegal Sentence Pursuant to Fla. R. Crim. Pro. 3.800(a) at DA3). The charge specifically states that the respondent, whose name is listed as Joseph Sal Mancino along with several aliases, burglarized a dwelling and that, "during the course thereof and within said structure was armed with a dangerous weapon, to wit: gun".

The documentation further reflects that the respondent entered a plea of nolo contendere to the charge of armed burglary and was sentenced in February of 1984 to serve 4 years in the Florida State

prison with a 3 year minimum mandatory sentence pursuant to s. 775.087(2). (See Exhibit 1 attached to the trial court's order denying appellant's motion for postconviction relief).

There was no direct appeal from this judgement and sentence. This is reflected in the trial court's order denying the motion to correct illegal sentence wherein the trial court states, "[t]here was no direct appeal." (See record on appeal, Order Denying Motion to Correct Illegal Sentence).

In December of 1994 (more than 12 years after sentence was originally imposed), respondent filed a pro se unsworn Motion To Correct Illegal Sentence pursuant to Fla. R. Crim. Pro. 3.800(a). (See said motion in record on appeal). Respondent alleged that there was no factual basis to support the imposition of the 3 year minimum mandatory sentence (no factual basis that appellant was in actual possession of a firearm during the commission of the burglary).

On January 30, 1997, the trial court entered an order summarily denying the motion to correct illegal sentence because the respondent's claim (that it was not proven that he actually possessed a firearm) was not properly filed under Fla. R. Crim. Pro. 3.800(a) but should have been raised under Fla. R. Crim. Pro. 3.850 and that the claim was barred under rule 3.850 because it was not filed with the 2 year period of limitation for claims under that rule. The trial court also noted that there was no direct appeal

taken from the judgement and sentence. (See record on appeal, Order Denying Motion To Correct Illegal Sentence). Respondent filed a timely notice of Appeal to the Second District Court of Appeals on February 5, 1997. (See Notice of Appeal included in record on appeal).

The Second District Court of Appeals reversed and remanded the case to the trial court in Mancino v. State, 22 Fla. L. Weekly D686 (Fla. 2d DCA March 14, 1997). The court stated in pertinent part:

> [t]his court has consistently held, not without some disagreement, that a defendant may properly invoke rule 3.800(a) as the appropriate postconviction vehicle to challenge the legality of a minimum mandatory sentence imposed under s. 775.087(2) based on a claim that there is no evidence to support the fact that the defendant actually possessed a firearm during the commission of one of the statutorily enumerated felonies. *See*, Word *State*, 682 So. 2d 642 (Fla. 2d DCA 1996); *Brown v. State*, 633 So. 2d 112 (Fla. 2d DCA 1994) (Altenbernd, J., dissenting). We must, therefore, consistent with our precedent, reverse the trial court's order and direct on remand that it determine whether the appellant manually possessed a firearm during the burglary. ***See*** *Butchek* v. Stats, 686 So. 2d 21 (Fla. 2D DCA 1996). If the trial court can make this determination by referring to documents in the record, then these documents must be attached to any subsequent order denying the motion. *Id*. Otherwise, the trial court must conduct an evidentiary hearing to resolve the appellant's claim. ***See*** *Robinson v. State,* 640 So. 2d 1200, 1201 (Fla. 2d DCA 1994).

Mancino, 22 Fla. L. Weekly at D 687.

The Second District Court of Appeals recognized and certified

conflict with the First District in Wickline v. State, 22 Fla. L. Weekly D337 (Fla. 1st DCA Jan. 31, 1997) (holding whether a defendant was in actual possession of a firearm during the commission of a felony so as to justify the imposition a 3 year minimum mandatory sentence is not cognizable under 3.800(a) and certifying conflict with Butchek) and with the Third District in Young v. State, 616 So. 2d 1133 (Fla. 3d DCA 1993)(holding that a challenge to an inadequate factual basis to support imposition of a 3 year minimum mandatory sentence under s. 775.087(2) must be brought under Fla. R. Crim. Pro 3.850 and not rule 3.800(a)). Mancino, 22 Fla. L. Weekly at D687.[1]

The Second District Court of Appeals also thought it proper to seek guidance from the Florida Supreme Court regarding whether a defendant must invoke rule 3.800(a) or rule 3.850 as the proper postconviction legal mechanism to attack a 3 year minimum mandatory sentence imposed pursuant to s. 775.087(2) on the basis that there is no factual basis to establish that a firearm was possessed during the commission of the statutorily designated felony. The Second District was motivated to seek this guidance based upon the Florida Supreme Court's recent decision in State v. Callaway, 658

[1]It should be noted that the Fourth District in Orestes v. State, 22 Fla. L. Weekly D595 (Fla. 4th DCA March 5 1997)has also stated that a challenge to a minimum mandatory sentence under s. 775.087(2) is not cognizable under rule 3.800(a) because it does not meet the supreme court's definition of an "illegal" sentence relying upon Davis v. State, 661 So. 2d 1193 (Fla. 1995) and Young v. State, 616 So. 2d 1133 (Fla. 3d DCA 1993).

So. 2d 983 (Fla. 1995). *Id*. The Second District certified the following question to the Florida Supreme Court:

> AFTER *STATE V. CALLAWAY*, *658 So.* 2D 983 (Fla. 1995), IS FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 RATHER THAN FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(A) THE APPROPRIATE POSTCONVICTION PROCEDURAL MECHANISM FOR CONTESTING A THREE-YEAR MINIMUM MANDATORY SENTENCE IMPOSED PURSUANT TO SECTION 775.087(2), FLORIDA STATUTES, ON THE BASIS THAT THE A FIREARM WAS NOT POSSESSED DURING THE COMMISSION OF ONE OF THE STATUTORILY DESIGNATED FELONIES?

Id.

Respondent timely filed a notice invoking the discretionary jurisdiction of the Florida Supreme Court.

SUMMARY OF THE ARGUMENT

The trial court should answer the certified question in the affirmative and should resolve the conflict of decisions in favor of the decisions rendered by the First, Third, and Fourth districts. Whether or not a three year minimum mandatory sentence was legally imposed for possession of a firearm during the commission of a felony can only be raised for purposes of postconviction relief by a sworn 3.850 motion not a 3.800(a) motion because it involves factual evidence and cannot be determined from the face of the record.

Respondent is not entitled to relief because he did not bring his motion under rule 3.850 but under rule 3.800(a) and respondent cannot now seek relief under rule 3.850 because he waited over 12 years from the date of his original sentence (there was no direct appeal) to seek postconviction relief and he is now time barred under rule 3.850(b).

ARGUMENT

ISSUE I (CERTIFIED QUESTION)

AFTER *STATE* V. *CALLAWAY*, 658 So. 2D 983 (Fla. 1995), IS FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 RATHER THAN FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(A) THE APPROPRIATE POSTCONVICTION PROCEDURAL MECHANISM FOR CONTESTING A THREE-YEAR MINIMUM MANDATORY SENTENCE IMPOSED PURSUANT TO SECTION 775.087(2), FLORIDA STATUTES, ON THE BASIS THAT THE A FIREARM WAS NOT POSSESSED DURING THE COMMISSION OF ONE OF THE STATUTORILY DESIGNATED FELONIES?.

This court should answer the certified question in the affirmative. The Second District Court of Appeals certified that its decision was in direct conflict with the First District in Wickline v. State, 22 Fla. L. Weekly D337 (Fla. 1st DCA Jan. 31, 1997) and the Third District in Young v. State, 616 So. 2d 1133 (Fla. 3d DCA 1993). Mancino v. State, 22 Fla. L. Weekly D 686 at 687 (Fla. 2d DCA March 14, 1997). Furthermore, the Second District recognized that this court in the case of State v. Callaway, 658 So. 2d 983 (Fla. 1995) seemed to have 'sent a clear message that rule 3.850 and not rule 3.800(a) is the appropriate rule to raise a sentencing error claim in a postconviction setting when the claim requires resolution of a factual issue and that, therefore, *Callaway* has implicitly overruled our prior holdings authorizing the use of 3.800(a) to resolve such a factual dispute within the realm of a three-year minimum mandatory sentence under s. 775.087(2). Mancino, ***supra.*** at D687.

In Callaway this court was considering whether a rule 3.800(a) or 3.850 should be the basis for resolving **a** postconviction attack on whether a Hale sentencing issue. See Hale v. State, 630 So. 2d **521** (Fla. 1993) (prohibiting the imposition of consecutive habitual felony offender sentences under s. 775.084 for multiple offenses arising out of the same criminal episode). This court stated:

> In *Judge* v. State, 596 So. 2d 73 (Fla. 2d DCA 1991) *review denied 613 So.* 2d 5 (Fla. 1992), the court recognized that there are three different kinds of sentencing errors: (1) an "erroneous sentence" which is correctable on direct appeal; (2) an "unlawful sentence" which is correctable only after an evidentiary hearing under rule 3.850; and an "illegal sentence" in which the error must be corrected as a matter of law in **a** rule 3.800 proceeding. *Id.* at 76, 77 & n. 1. We recently explained that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regards to the guidelines. *Pavis v. State No.* 84,155, So. 2d ___ [1995 WL 42417201.' A ***rule*** 3.800 motion can be filed at any time, even decades after **a** sentence has been imposed, and as such, its subject matter ***is limited to those* sentencing issues that *can be resolved as a* matter *of law* without *an evidentiary determination.*** (Emphasis added)

Callaway, *supra.* at 987-988.

This court concluded that because a Hale sentencing error is not a pure question of law, and because it necessarily involves the resolution of factual evidence involving the times, places, and circumstances of the offense which often cannot be determined from the face of the record, "resolution of the issue will require an ***evidentiary determination and thus should be dealt with under rule***

3.850 which specifically provides for *an evidentiary hearing."* Id. at 988. (Emphasis added.)

It is interesting to note that this Court relied upon the reasoning of Judae v. State, **supra.,** in Callaway, *supra.,* and that the Callaway decision was an en *banc* decision written by Judge Altenbernd. Judge, *supra.* at 76. This point of interest is made because of the separate opinion of Judge Altenbernd in Brown v. State, 633 So. 2d 112 (Fla. 2d DCA 1994). In Brown, the Second District held that a defendant who pled no contest to an armed robbery charge in which it was alleged that he used a firearm could subsequently raise in a motion to correct an illegal sentence under rule 3.800(a) that there was no credible evidence to support a 3 year minimum mandatory sentence under s. 775.087(2). The trial court had denied the motion stating that the matter should have been brought up on direct appeal. The district court citing the case of Poiteer v. State, 627 So. 2d 526 (Fla. 2d DCA 1993) held that reversal and remand was necessary because the appellate record lacked the necessary exhibits for the appellate court to determine if the appellant's claim could be refuted by the trial court and the trial court did not reach the merits of the claim. Brown, *supra.* at 113.

Judge Altenbernd in his separate opinion concurring in part and dissenting in part, agreed that the defendant should be allowed to challenge the sentence but not pursuant to rule 3.800(a). Judge

Altenbernd stated that he would follow the conflicting decision in Young v. State, 616 So. 2d 1133 (Fla. 3d DCA 1993). The appropriate remedy, according to this judge was to raise the issue in a sworn motion filed pursuant to rule 3.850 because the challenge to the defendant's sentence involved factual issues. *Id*.

Judge Alternbernd set forth the three types of sentencing errors in Brown, *Id*. at 115 (although without labeling them "erroneous", 'unlawful", and "illegal") that he later defined in Judge v. State, *supra*. at 76-77 & n. 1, and that this court recognized in Callaway, *supra*. at 977-988. The judge went on to reason in his dissenting opinion:

> ***There are*** *at least two situations* ***in which a minimum mandatory sentence can be*** an ***illegal sentence, subject to challenge at any time. First, if the defendant*** *was* ***not charged in the information with the use*** **of** ***a firearm, he could*** not ***be convicted of an offense involving a firearm. On the face*** **of** ***his court record, the minimum mandatory would not be authorized by law and its imposition would be illegal without reference to any factual dispute. (Citation omitted). Second, even if charged with a crime involving the use of a handgun, if the conviction is for a offense, not requiring the use of a firearm, such a*** *sentence* ***would be facially illegal.*** Again the record should establish this error without the need for an evidentiary hearing. This case does not involve either of these situations.
>
> Our record does not contain a transcript of the plea colloquy or the sentencing hearing. Mr. Brown at least implies that the use of a handgun was not established during either hearing. I agree with the Third District that the adequacy of the factual basis in a plea colloquy is a matter to be tested under rule

> 3.850 within two years. ***The state should not be required to retain plea colloquies indefi***nitely ***and to*** transcribe ***them whenever a defendant chooses to allege an "illegal" sentence.*** Young v. State, ***616*** so. 2d 1133.
>
> In Koenig v. State, 597 So. 2d 356 (Fla. 1992), the supreme court emphasized the importance of an adequate plea colloquy to satisfy the requirements of due process. I fully agree with that analysis, but Koenig was a direct appeal. To allow a defendant to challenge a conviction on direct appeal or even within two years under rule 3.850 because his attorney improperly stipulated to an incorrect factual predicate is very sensible. On the other hand, ***to challenge a sentence, not*** a ***conviction, because an*** of ***an insufficient factual discussion at the plea colloquy or the sentencing colloquy, should occur within two years and should require allegations under oath.*** Nothing about these reasonable limitations appears to deny a defendant due process. (Emphasis added)

Brown, *Id*. at 116

In the instant case, respondent was charged with armed burglary and "during the course thereof and within said structure was armed with a dangerous weapon, to wit: gun." (See exhibit DA 3 attached to respondent's original Motion to Correct Illegal Sentence. Respondent even admits that he entered a plea to armed burglary in his Motion to Correct Illegal Sentence (See Motion To Correct Illegal Sentence at p. 1). The sentencing documents reflect that respondent pled no contest to armed burglary and received a sentence of 4 years imprisonment with a 3 year minimum mandatory pursuant to s. 775.087(2) (See copies of the judgment and sentence attached as Exhibit 1 to the trial court's Order Denying

Motion To Correct Illegal Sentence).

In Young v. State, 616 So. 2d 1134, the Third District noted that the defendant pled guilty to robbery with a firearm and that the three year minimum mandatory sentence is legally authorized for this sentence. Likewise, in the instant case respondent pled guilty to armed burglary and a four year sentence with a three year minimum mandatory is a legally authorized sentence for such an offense under s. 810.02(2) (b) and 775.087(2), Fla. Stat. (1983). Such a sentence is not an 'illegal sentence" because it does not exceed the maximum period set forth by laws for the particular offense. See Callaway v. State, 658 So. 2d at 988.

Whether the unsworn factual allegations of the respondent in his 3.800(a) are true or not would require an evidentiary hearing and should have been brought under rule 3.850. This is necessary so as to give the state an opportunity to refute the factual allegations asserted in appellant's motion regarding testimony contained in depositions of the witnesses and appellant's own allegations were in he personally states that he never actually or manually possessed a firearm during the commission of the offense (See respondent's Motion To Correct Illegal Sentence at p. 1, 6). Since neither the plea and/or sentencing colloquy were ever transcribed (as the petitioner stated in its preliminary statement), there is also no way to determine from the trial record whether a factual basis was given indicating the respondent did in fact possess a

firearm during the commission of the crime or if respondent did, in fact, admit possessing a firearm during the commission of the offense at the time he entered his plea and/or was sentenced.

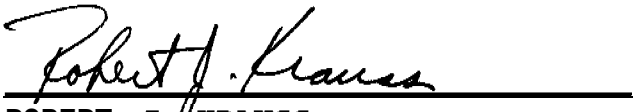
Respondent has waited over 12 years to to seek any postconviction relief. His remedy was to seek relief under rule 3.850 and he is now time barred by the 2 year limitation set forth in Fla. R. Crim. Pro. 3.850(b).

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, petitioner respectfully requests that this Court answer the certified question in the affirmative, resolve the conflict of decisions in favor of the decisions out of the First, Third and Fourth Districts as cited herein. Furthermore, petitioner requests that under the factual circumstances of this particular case, respondent should be denied relief **because** he is now time barred to assert the relief he seeks under rule 3.850(b).

Respectfully submitted,

ROBERT a. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Joseph Sal Mancino, DOC# 16564 (R-6), Apalachee Correctional Institution, P.O. Box 699-West, Sneads, Florida 32460, this 17th day of April, 1997.

COUNSEL FOR PETITIONER