085

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 90,174

JOSEPH SAL MANCINO,
aka JOSEPH SAL MACKINO,
aka PAUL NICOLINO RENO,
aka PAUL DELUCCA,

Respondent.
_____/

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

STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

JOSEPH SAL MANCINO, PRO SE
DC#165264 (E2-121S)
Apalachee Correctional Institution
P.O. Box 699-West Unit
Sneads, Florida 32460

COUNSEL FOR RESPONDENT

Joseph Sal Mancino, pro se

on the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE(S)

OTHER AUTHORITIES

Florida Rule of Appellate Procedure 9.020(g)

Florida Rule of Criminal Procedure 3.170(j)
Florida Rule of Criminal Procedure 3.800(a)
Florida Rule of Criminal Procedure 3.850
Florida Rule of Criminal Procedure 3.850(b)
Florida Rule of Criminal Procedure 3.850(b)(1)

Florida Statutes § 775.087(2) (1983)
Florida Statutes § 810.02 (1983)
Florida Statutes § 810.06 (1983)
Florida Statutes § 812.019 (1983)
Florida Statutes § 924.051 (1996)
Session Law Number 5, Chap. 96-248 § 4

Florida Constitution Art. 1, § 9
Florida Constitution Art. V, § 3(b)(7)
United States Constitution Amend. 14

13 Fla. Jur. 2d, Courts and Judges § 136

PROCEDURAL HISTORY

Respondent respectfully submits for this Honorable Court's consideration the following procedural history,[1] which is set forth in chronological order:

1). On the 27th day of May, 1983, respondent, under the name Joseph Sal Mackino, was arrested by the Pinellas County Sheriff's Department in the city of Largo, Florida, approximately two-hundred (200) yards from the scene of a burglary of an unoccupied dwelling. (See "Felony Information," Marked DA3 in respondent's initial R. 3.800(a) motion to trial court). A few items of jewelry were identified by the owners of the residence when they later arrived on the scene as the only property stolen from the residence. Said jewelry was found in respondent's possession. No firearm was found on the respondent, or anywhere near the vicinity of where respondent was apprehended.

2). Respondent was initially charged with burglary, possession of burglarious tools, and grand theft. While respondent was being held in the Downtown Clearwater Pinellas County Jail (said jail was closed in 1983), the first "felony information" was filed charging respondent with the same crimes, aforesaid, on or about July 1, 1983.

3). The charging information was apparently amended between July of 1983 and October of the same year; but respondent is not aware of what in particular was amended in the second version of the felony information. On the 1st day of October, 1983, the third "amended" "Felony Information"

1/ This pleading, in toto, is set forth under oath as delineated by this Court in State v. Shearer, 628 So. 1102 (Fla. 1994). As with respondent's initial brief and R. 3.800(a) motion to the trial court underlying this appeal, a legally sufficient VERIFICATION is attached hereto.

issued now charging: (1) One Count of Armed Burglary, 1st Degree, contrary to §810.02, Florida Statutes (1983); (2) One Count of Possession of Burglarious [sic] Tools, Third Degree, contrary to §810.06, Florida Statutes; and, (3) One Count of Grand Theft, Third Degree, contrary to §812.019.[sic], Florida Statutes. (See Felony Information, DA3).

4). On February 17th, 1984, respondent entered a plea of nolo contendere at the behest of his trial counsel, then Assistant Public Defender, Paul D. Ley, despite almost ten (10) months of arguments with said counsel over the issue of the armed feature attached to the burglary charge. Respondent consistently maintained to counsel that he was not armed at any time during the commission of the burglary in question. The armed feature of the burglary was predicated on the purported finding of a rusted firearm in the open field where respondent was apprehended. Said firearm was not found until an hour and a half after respondent was subdued. The weapon was rusted when found, and no fingerprints were present on the firearm. The weapon was located after an extended search by law enforcement around fifty (50) yards from where respondent was apprehended. Noteworthy here, is the fact that two of the citizens who apprehended respondent after the burglar alarm of the residence was activated were in visual contact with respondent as he fled the residence until he was arrested by Sheriff's Officers. At no time did respondent physically venture anywhere even near where the rusted firearm was purported to be found. Since respondent was, in essence, a non-violent jewel thief, he never - as a matter of principle - carried a firearm during the commission of a burglary. He burglarized unoccupied dwellings and made an extra effort out of habit to avoid violence. Respondent abhored confrontation and strove to avoid it at all costs. In view of the potential for violence if a confrontation ensues during the commission of a burglary, respondent never armed himself. Nevertheless, counsel finally

badgered respondent into entering a plea of nolo contendere since it would not, in counsel's words, be a technical admission of guilt to the armed feature. Moreover, defense counsel Ley insisted that the state attorney adamantly wanted a conviction for a first degree punishable by life on his record but, as a concession, would reduce the prison term to a four (4) year cap and run other separate pending cases concurrent with the four (4) year prison term imposed on the armed burglary. Against that backdrop respondent reluctantly entered a plea of nolo contendere on February 17th, 1984. Respondent honestly contends that he doesn't remember the trial court making any effort to establish a factual basis for the plea or any admissions on his part to the armed feature of the burglary. Since respondent was not armed, the plea proceedings were reminiscent of a Kafkaesque nightmare. Respondent was ultimately sentenced on February 17th, 1984, to concurrent four (4) year terms of imprisonment on all pending charges, with a three (3) year minimum mandatory imposed pursuant to §775.087(2), Florida Statutes (1983).

5). Eleven (11) days after respondent's aforementioned sentencing on February 17th, 1984, respondent was transported from the then new Pinellas County Jail Complex to the Palm Beach County Jail (Gun Club Road) to face unrelated charges which were ultimately nolle prossed. (See Exhibit "D" of respondent's appendix attached hereto). On April 18th, 1984, after a hearing before the Honorable Mary Lupo wherein the court orally pronounced the Palm Beach cases dismissed, respondent was transported to the Florida Department of Corrections pursuant to the "Uniform Commitment to Custody" order signed by the Honorable Maynard F. Swanson relevant to the Pinellas County armed burglary sentence on February 17th, 1984. (See Ex. "B", attached hereto).

6). On that same date, April 18th, 1984, sixty-one (61) days

after respondent's Pinellas County sentence was handed down, respondent escaped custody while being transported by a private transportation service to the Fla. Dept. of Corrections. (See Ex. "B", attached hereto). Respondent remained a fugitive in the jurisdiction of Arizona until his arrest on April 21st, 1985. Respondent waived extradition to the state of New Jersey pursuant to a 1978 fugitive warrant. Respondent proceeded to trial in New Jersey, was convicted, and then sentenced to an aggregate term of twenty-five (25) years imprisonment. (See Exs. A-C). The capias warrant relevant to the Florida burglary sentence sub judice, stood as Florida's detainer against the respondent from May 10th, 1985, until March 12th, 1996, when, after respondent's New Jersey parole was effectuated said capias warrant was executed. Respondent, thus, was transported back into Florida's legal jurisdiction on March 12th, 1996. It must be noted that, since respondent was sentenced in the instant matter on February 17th, 1984, he has been in the jurisdiction of the Florida Judicial System for a total of sixty-one (61) days between 2/17/84 and 2/18/84 (when respondent escaped), and approximately 410days between the date respondent was received into the Florida Department of Corrections on March 12th, 1996, and April 30th, 1997, or the present. The remainder of time between February 17th, 1984 and March 12th, 1996, represents respondent's service of his New Jersey prison sentence in the New Jersey State Prison at Trenton, New Jersey. (See Ex. "C").

7). On December 23rd, 1996, or approximately nine months after respondent was received into the Fla. Dept. of Corrections, respondent filed the pro se Motion to Correct Illegal Sentence sub judice. Said motion was under oath as evidenced on the notice of motion cover-page by the following declaration: "I HEREBY CERTIFY by my signature below that the instant motion is true and correct and, if wilfully false, I am subject to punishment for perjury[,]" which was then signed and dated. See 28 U.S.C. §1746.

8). On January 30th, 1997, the Sixth Judicial Circuit Court in and for Pinellas County, Florida, denied respondent's R. 3.800(a) motion. The trial court posited that the motion "[was] not a proper claim under R. 3.800(a)" and, further noted, in dicta, that the claim "should be raised under Rule 3.850...[h]owever, [the] motion is untimely, as [respondent's] judgment and sentence was entered more than two years ago, and there was no direct appeal." Interestingly, though the court ventured to reason that R. 3.850 was the proper mechanism to advance an attack such as the respondent's, it never considered if respondent's petition was viable under R. 3.850(b)(1) since it was clear respondent could not ascertain, despite the exercise of due diligence, the facts, rules of procedure, and/or case precedent to file a proper R. 3.850 motion while imprisoned in a New Jersey penitentiary. The trial court was authorized to treat respondent's petition as if the proper remedy was sought. This is especially true since the trial court knew respondent's history, including his escape, his long imprisonment in New Jersey under a Pinellas County, Florida detainer, and respondent's efforts to obtain information from the court while he was incarcerated in another state regarding procedural rules, etc. Instead, the trial court cited to §924.051, Florida Statutes (1996), as its sole reason for denying respondent's R. 3.800(a) motion. It must also be noted that the trial court's use of §924.051, F.S., was an ex post facto application.

9). On February 10th, 1997, respondent timely filed a Notice of Appeal to the Second District Court of Appeal pursuant to Fla. R. App. P. 9.140(g). It was docketed in that court as Case No. 97-00583.

10). On March 14th, 1997, the Second District Court of Appeal rendered an Order which reads in pertinent part: "[w]e, therefore, reverse

the trial court's order denying appellant's rule 3.800(a) motion, remand for further proceedings consistent with this opinion, certify conflict with other district courts of appeal, and certify a question of great public importance to the Florida Supreme Court." (See Opinion, p. 11).

11). Petitioner subsequently filed a timely "Notice to Invoke Discretionary Jurisdiction" of this Honorable Court on March 18th, 1997. On the same date, petitioner also filed a "Motion to Stay Mandate Pending Appeal" to the Second District Court of Appeal "pursuant to Fla. R. App. Pro [sic] 9.130 (1996)."

12). The Sixth Judicial Circuit Court issued an Order to Show Cause on the 21st day of March, 1997, as a result of "the opinion of the Second District Court of Appeal in regard to this Court's denial of defendant's Motion to Correct Illegal Sentence." (See ORDER TO SHOW CAUSE).

13). Respondent timely filed a response to petioner's motion to stay the mandate on March 25th, 1997.

14). On March 26th, 1997, the Honorable Sid J. White, Clerk of the Florida Supreme Court, issued an "Order Postponing Decision on Jurisdiction and Briefing Schedule" for case number 90,174.

15). The Second District Court denied petitioner's motion to stay mandate pending appeal on March 27th, 1997.

16). On April 1st, 1997, the Second District Court fowarded the mandate, Case Number 97-00583, to the Sixth Judicial Circuit Court for further proceedings consistent with its opinion rendered in the instant case.

17). On or about April 11th, 1997, petitioner filed a "Motion to Stay or Recall Mandate of Second District Court of Appeals [sic]" to the Florida Supreme Court.

18). On the 15th day of April, 1997, respondent filed a "Response to Stay or Recall Mandate" to this Honorable Court requesting that the Second District Court's order denying petitioner's previous motion to stay be affirmed.

19). Petitioner's merit brief was filed to this Court on April 17th, 1997, in accordance with the briefing schedule set forth on March 26th, 1997. Respondent received petitioner's merit brief, as evidenced by the Apalachee Correctional Institution's mailroom log sheet, on April 21st, 1997.

20). On April 23rd, 1997, this Court granted petitioner's motion to stay or recall mandate and stayed all proceedings in this case pending disposition "of the Petition for Review filed herein."

21). Respondent now files the instant "response brief on the merits" for judicial consideration by the Honorable Justices of the Supreme Court, State of Florida. This brief is filed in accordance with Fla. R. App. P. 9.210.

STATEMENT OF FACTS

[Preliminary Statement: Respondent, with the exception of the following pertinent statement of facts, relies on the Statement of Facts set forth in his R. 3.800(a) motion to the trial court which underlies this appeal.]

Based upon established case precedent within the Second District Court of Appeal, respondent made a reasonable litigating decision relevant to the filing of a motion challenging the imposition of a three (3) year minimum mandatory pursuant to §775.087(2), Florida Statutes (1983). In reliance on the stability to the law stare decisis provides, respondent chose to use the procedural standard set forth by the 2d DCA. Accordingly, respondent filed a motion to the trial court under Fla. R. Cr. P. 3.800(a).

Indeed, the respondent could have filed his motion under R. 3.850(b), citing such exceptional circumstances as: (1) the respondent was imprisoned in another jurisdiction for twelve (12) years between the date his sentence became final and the date he could actually file a cognizable R. 3.850 motion within the jurisdiction of the court; (2) respondent could not have ascertained, despite the exercise of due diligence, any Florida Rules of Criminal Procedure, case authorities, legal bases, or relevant facts necessary to the proper filing of a R. 3.850(b) motion while indigent and imprisoned in a New Jersey penitentiary; and, (3) a fair accounting of the two-year filing limitation period set forth in R. 3.850(b), as it pertains to respondent, would show that since respondent's Florida prison sentence became final on March 17th, 1984, he has been within the Florida Judicial System's jurisdiction for a total of approximately 461 days, or well within the two-year filing limitation set forth in R. 3.850(b).

Finally, respondent's R. 3.800(a) motion now under review by this Honorable Court was properly sworn within the meaning of Chapter 92.525, Florida Statutes (1994); 28 U.S.C. § 1746; Cf. 18 U.S.C. § 1621; and, as interpreted by this Court in State v. Shearer, 628 So. 2d 1102 (Fla. 1994).

SUMMARY OF THE ARGUMENT

ISSUE ONE: A sentencing error which implicates predjudice by adversely "affecting life, liberty, or property," invokes a fundamental right to "request at any time a sentence within the confines of the law." Any time a sentencing error can be established as the causal nexus to a convicted prisoner's having to be incarcerated or restrained for a greater length of time than provided for by statute, predjudice attaches and that category of error, whether called "illegal," "unlawful," or "erroneous" activates an automatic fundamental due process right to move for relief in any and every legal manner possible in accord with Florida case law.

ISSUE TWO: Since the doctrine of stare decisis engendered a confidence in the stability of case precedent vis-a-vis respondent's litigating decisions, the intricate tapestry of case precedent should not be unravelled when corrective legislative action has already been undertaken. Respondent made a valid litigating decision to file a R. 3.800(a) motion predicated on the well established controlling precedent within the jurisdiction in which he filed. Thus, it can't be the intent of the Florida Rules of Criminal Procedure or this Court's decisions in Davis and Callaway to "mousetrap" a litigant into relying on the stability and even-handedness stare decisis provides only to nullify the petition's facial sufficiency on the grounds that decisions of the Florida Supreme Court not on all fours with respondent's case are now interpreted to bar relief under the Florida Rule of Criminal Procedure by which respondent filed. This is especially applicable to the case sub judice because respondent has only been able to study Florida case law and rules of procedure less than a year and is proceeding in propria persona. Too, respondent could have filed a viable R. 3.850 motion citing to the exception delineated in R. 3.850(b)(1).

ISSUE THREE: Since courts are authorized to treat pro se prisoners' petitions as if the proper remedy was sought, this Court is vested with the judicial power, under the "All Writs" jurisdiction delineated in Article V. Section 3(b)(7), (particularly since the Court has acquired jurisdiction of this case independently), to issue an order directing the trial court to proceed with respondent's "Motion to Correct Illegal Sentence" sub judice as if it was filed under Fla. R. Cr. P. 3.850(b). Too, this Court can instruct the trial court that it has made a finding that respondent has established "cause" why his petition should be allowed to proceed under R. 3.850(b).

MEMORANDUM OF LAW

ISSUE ONE:

IMPOSITION OF A THREE (3) YEAR MINIMUM MANDATORY PAROLE INELIGIBILITY VIA § 775.087(2), FLORIDA STATUTES (1983), IN THE ABSENCE OF SUBSTANTIVE RECORD EVIDENCE ESTABLISHING A FACTUAL BASIS THEREFOR, "EXCEEDS THE MAXIMUM PENALTY PERMISSIBLE UNDER" THE STATUTE AND, THUS, PROVIDES A "FUNDAMENTAL RIGHT TO REQUEST AT ANY TIME A SENTENCE WITHIN THE CONFINES OF THE LAW[,]" AS DEFINED BY JUDGE ANSTEAD'S DISSENT IN BEDFORD V. STATE, 617 SO. 2D 1134, 1135-36 (FLA. APP. 4 DIST. 1993), AND ADOPTED BY THIS HONORABLE COURT AT 633 SO. 2D 13, 14 (FLA. 1994).

"Because our criminal justice system does not permit a defendant to serve a sentence that exceeds the maximum penalty permissible under our laws, [respondent's] Rule 3.800(a) motion should have been granted by the trial court and his sentence corrected." Bedford v. State, 617 So. 2d 1134, 1135 (Fla. App. 4 Dist. 1993)(Anstead, J., dissenting). In view of then Judge Anstead's dissent, which was adopted by this Honorable Court in Bedford v. State, 633 So. 2d 13 (Fla. 1994), the Second District Court's reversal of the lower tribunal's denial of respondent's R. 3.800(a) motion was just and proper. Thus, the decision of the Second District Court in Mancino v. State, 22 Fla. L. Weekly D686 (Fla. 2d DCA March 14th, 1997), should not be disturbed.

Since this Honorable Court handed down its decisions in Davis v. State, 661 So. 2d 1193 (Fla. 1995), and State v. Callaway, 658 So. 2d 983 (Fla. 1995), the district courts of appeal have construed this Court's definition of an "illegal" sentence in different and, often contradictory, ways. See, e.g., Stacey v. State, 22 Fla. L. Weekly D366 (Fla. 1st DCA February 4th, 1997); Gibbs v. State, 22 Fla. L. Weekly D101 (Fla. 1st DCA December 30th, 1996); Raley v. State, 675 So. 2d 170 (Fla. App. 5 Dist. 1996); Cf. Dye v. State, 667 So. 2d 935, 936 (Fla. App. 2 Dist. 1996);

Hubbard v. State, 667 So. 2d 936, 937 (Fla. App. 2 Dist. 1996); Becton v. State, 688 So. 2d 1107 (Fla. App. 2 Dist. 1996). To illustrate the tumultuous impact that the Davis and Callaway decisions have engendered vis-a-vis a district court's well established precedent, the Fifth District Court of Appeal has held:

> However, [despite Callaway and Davis] since our courts have sanctioned the broad scope of review afforded by Rule 3.800(a), we are constrained to do the same here.

Raley v. State, 675 So. 2d at 175.

Moreover, careful analysis of the First District's decision in Gibbs v. State, supra., clearly reflects the problem the courts now face having to apply the narrow scope of review under R. 3.800(a) using the more conservative interpretation that Davis and Callaway now stand for the proposition that only sentences exceeding the statutory maximum can be corrected via R. 3.800(a). Thus, the First District Court certified the following question to this Court:

> WHERE THE TRIAL COURT RECORD REVEALS THAT THE TRIAL COURT HAS FAILED TO AWARD CREDIT FOR UNFORFEITED GAIN TIME AS REQUIRED BY STATE V. GREEN, IS THE ERROR REMEDIABLE UNDER R. 3.800(A) EVEN THOUGH THE DENIAL OF CREDIT HAS NOT CAUSED THE DEFENDANT TO BE SENTENCED TO A PERIOD IN EXCESS OF THE STATUTORY MAXIMUM FOR HIS OFFENSES?

Gibbs, at D101 (emphasis added).

In a subsequent ruling, the First District Court "acknowledge[d] some doubt that the supreme court intended by its decisions in King, Davis and Callaway to preclude a 3.800(a) claim of this sort." In an effort to understand this Court's true intent of those rulings, the 1st DCA certified the following question:

> WHERE THE TRIAL COURT RECORD REVEALS THAT THE MINIMUM MANDATORY PORTION OF A SENTENCE IS EXCESSIVE UNDER

PALMER V. STATE, MAY THE ERROR BE CORRECTED UNDER RULE 3.800(A) EVEN THOUGH THE OVERALL SENTENCE IS WITHIN THE STATUTORY MAXIMUM FOR THE OFFENSES?

Stacey v. State, 22 Fla. L. Weekly at D366 (emphasis added).

Respondent submits that the narrow construction of Davis and Callaway adopted by the First, Third, and Fourth District Courts is misplaced. To support this view, one has only to look at Judge Anstead's illustration of the"reasoning of Judge Cowart of the Fifth district[sic]" Court in Bedford:

> All persons in prison under a sentence for the commission of a crime are there because the judicial system declared they did not follow and obey the law but, to the contrary, they did an illegal act. Certainly in imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the sys- should willingly remedy it. The purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, our criminal justice system must provide a remedy to one in confinement under an illegal sentence. There is no better objective than to seek to do justice to an imprisoned person. [citing] Hayes v. State, 598 So. 2d 135, 138 (Fla. 5th DCA 1992).

Bedford, 617 So. 2d at 1135.[1]

If the First, Third, and Fourth District Courts of Appeal are correct that Davis and Callaway stand for the proposition that only sentences exceeding the statutory maximum are cognizable for relief under R. 3.800(a), then how does this Court reconcile that reasoning with Judge Anstead's dissent in Bedford v. State, 617 So. 2d 1134, 1135 (Fla. App. 4

1/ It is interesting to note that the Fifth District Court in Raley v. State, supra., restated this quote, verbatim, when it held that "courts are duty bound to correct...illegal sentence[s] whenever presented with a motion indicating [same]...." Id. at 172, citing to Brown v. State, 664 So. 2d 311, 312 (Fla. 1st DCA 1995)(courts have the authority to treat prisoners' petitions as if the proper remedy was sought if it would be in the interest of justice to do so).

Dist. 1993), which this Court "adopt[ed]" in Bedford v. State, 633 So. 2d 13 (Fla. 1994) at 14, and, thus is cited to in Davis itself? In point of fact, the full court in Bedford concurred with Justice McDonald's holding "that the only illegal part of [Bedford's] sentence [was] the prohibition of eligibility for parole." Bedford, 633 So. 2d at 14 (emphasis supplied). Justice McDonald further ruled that "[t]he appropriate remedy, therefore, is to strike the provision relative to [the ineligibility] for parole." Id. at 14.

The First District Court's difficulties since Davis and Callaway, relevant to its perception of the limited reach of R. 3.800(a), is especially interesting when one considers Judge Lazarra's poignant footnote in the opinion reversing the respondent's case now before this Court:

> Ironically, the genesis for our precedent in this area of the law stems from a First District case. See Anfield v. State, 615 So. 2d 853 (Fla. 2d DCA 1993)(citing Bell v. State, 589 So. 2d 1374 (Fla. 1st DCA 1991), in support of the proposition that a three-year minimum mandatory sentence imposed pursuant to section 775.087(2) constitutes an illegal sentence if firearm not carried during the commission of a felony), limited by Poiteer, 627 So. 2d at 527 (declining to follow Bell to the limited extent it suggests mere procedural failure to find a factual basis for imposing a three-year minimum mandatory is reversible error).

Mancino v. State, 22 Fla. L. Weekly at 688. (emphasis added).

When the trial court, in the case sub judice, ruled on respondent's R. 3.800(a) motion, it denied the motion as improperly filed under R. 3.800(a). It must be pointed out, however, that the trial court cited only to "Section 924.051 Florida Statutes (1996)" as the basis for its denial. See Session Law, #5, Chapter 96-248 § 4. Too, the trial court never reasoned in its denial order that only sentences which exceed the statutory maximum are cognizable for relief pursuant to R. 3.800(a).

Ultimately, the trial court employed an ex post facto application of §924.051, Florida Statutes (1996) to deny respondent's R. 3.800(a) motion.

Clearly, a prison sentence bottomed on acceptance of a plea to a law or statute that the defendant did not violate is not a sentence authorized by law. It is axiomatic, therefore, that any sentence which obtains as a result of such a plea, is an illegal sentence within the meaning of Bedford, 633 So. 2d at 14; Davis, 661 So. 2d at 1196 (citing Bedford, supra.); Raley, 675 So. 2d at 173 (citing Bedford, Davis, and Callaway); and even Callaway, 658 So. 2d at 987-88 (citing Davis and Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991)(en banc)).

Florida Rule of Criminal Procedure 3.170(j) provides:

> No plea of guilty or nolo contendere shall be accepted by a court without first determining ...that there is factual basis for the plea of guilty. Id. (emphasis added); See Shannon v. State, 406 So. 2d 87 (Fla. App. 1 Dist. 1981) at 88.

This Court, in Walker v. State, 462 So. 2d 452 (Fla. 1985)(Shaw, J., concurring in result only, without opinion), ruled that "failure of the trial court to make findings of fact in support of the imposition of an extended sentence" was of a nature that "required the remand of the cause so that the trial judge could make the necessary finding." Id. 453. Moreover, this Court found that legislative intent of statutes calling for mandatory or extended terms corresponds with the common law principle applicable to all pleas, which is, that due process of law mandates the trial court to make findings of fact regarding eligibility for such statutes before they can be legally applied to a particular defendant.

Obviously, the purpose for determining a factual basis before acceptance of a plea "is to insure that the facts of the case fit the offense for which the defendant was charged." Shannon v. State, at 88 citing Williams v. State, 316 So. 2d 267 (Fla. 1975). To ascertain that the factual predicates are actually in violation of the statute cited by the state before a court's acceptance of a plea, is a common sense juridical mechanism "intended to preclude an unwitting admission of guilt for a crime the defendant did not in fact commit." Bell v. State, 589 So. 2d 1374 (Fla. App. 1 Dist. 1991) at 1376, citing Shannon, at 88; Cf. State v. Kendrick, 336 So. 2d 353, 355 (Fla. 1971).

As this Honorable Court has noted:

> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. 1, § 9, Fla. Const...."[D]ue process" embodies a fundamental conception of fairness that derives from the natural rights of all individuals. See Art. 1, § 9, Fla. Const.

Scull v. State, 569 So. 2d 1251 (Fla. 1990) at 1252.

To even suggest that Davis and Callaway now endorse the legality of a prison sentence obtained as a result of a plea to a law or statute a defendant did not in fact violate, insults Judge Cowart's notion that the "purpose of criminal justice rules, practices and procedures is to secure a just determination of every case in accordance with the substantive law." Moreover, it offends the inalienable rights guaranteed to all criminal defendants as articulated in the United States and Florida Constitutions.

Since "fifty to sixty percent" of postconviction proceedings heard in the federal and state courts emanate out of guilty pleas, this Court has

soundly reasoned that it is, therefore, essential that a "proper and thorough inquiry [be undertaken] by the court at the time of the guilty plea in order to insulate the plea from unnecessary appellate and post-conviction proceedings." Williams, 316 So. 2d at 270. This Court further seemed to suggest in Williams that, absent a pre-sentence investigation focusing "more directly upon the facts surrounding the alleged crime to which the defendant entered a plea[,]" a judge should "make a detailed inquiry of the defendant concerning the precise nature of his conduct." Williams, at 272 (emphasis added).

Thus, the petitioner's rationalization that a defendant needs merely enter a plea of nolo contendere to a crime enumerated within § 775.087(2), (even absent a factual basis to sustain a legal conviction for that crime) to somehow validate an otherwise illegal sentence, is contradicted by well established case law. As this Honorable Court articulated in Williams v. State, 500 So. 2d 501 (Fla. 1986), "[a] defendant cannot by agreement confer on the court the authority to impose an illegal sentence....[T]he mere fact that a defendant agrees to it does not make it a legal sentence." Id. at 503 (emphasis added); See also, Robbins v. State, 413 So. 2d 840, 842 (Fla. App. 3 Dist. 1982)(where fundamental error, such as sentence which exceeds the lawful limit, appears on the record, it is reviewable... despite failure of the defendant to raise the issue below).

It is equally noteworthy that the First District Court, citing to Earnest v. State, 351 So. 2d 957 (Fla. 1977), held that, "[a] defendant must actually possess the firearm during the crime to be subject to the [three-year] minimum mandatory." Turpin v. State, 651 So. 2d 176 (Fla. App. 1st Dist. 1995) at 177 (emphasis added). It is evident from that line of reasoning that a defendant "subjected" to a three (3) year minimum mandatory pursuant to §775.087(2), Florida Statutes (1983), absent a

thorough "inquiry at the plea hearing whether there was a factual basis for imposing the minimum mandatory[,]" is an illegal sentence within the meaning of Bedford, 633 So. 2d 13 (Fla. 1994). Turpin, at 177.

As enunciated by this Court in 1977, "[S]ection 775.087(2), Florida Statutes, (1975), prescribes a three year minimum term of imprisonment for any person convicted of [an enumerated offense within the statute] who had in his possession" a firearm. Earnest v. State, supra., at 958 (emphasis added). Of interest in this ruling is the fact that Earnest dealt with a case where vicarious possession of a firearm was a conceded fact before the court. Still, this Court reasoned that Earnest was "entitled to the benefit of the doubt" vis-a-vis the legislative intent of §775.087(2). Earnest, at 959. Thus, when a factual basis for a plea is alleged to be devoid of any substantive finding that the defendant actually possessed a firearm during commission of one of the enumerated crimes referenced in §775.087(2), it is an illegal sentence within the meaning of Earnest, Bedford, and Davis. In Bedford, 633 So. 2d at 14, this Court issued an order which struck the "provision relative to [the prohibition for] parole." Stated another way, this Court found "that the only illegal part of [Bedford's] sentence [was] the prohibition of eligibility for parole." To redress the "illegal aspect" of his sentence, this Court struck the minimum mandatory provision from Bedford's life sentence under the "seldom applicable" all writs jurisdiction articulated in Article V., §7, Florida Constitution. Since the twenty-five (25) year mandatory aspect of Bedford's sentence is legally indistinguishable from respondent's three (3) year mandatory, with the exception of the number of years each mandatory comprehends, common sense dictates that if Bedford's sentence is illegal, then respondent's sentence is illegal! See Bedford v. State, 633 So. 2d 13 (Fla. 1994).

In the case at bar, that portion of the sentence withholding parole for three (3) calendar years pursuant to §775.087(2), is in excess of the permissible range authorized by the legislature and, thus, a priori, illegal. As here, if there is no record evidence which reflects that a defendant actually possessed a firearm during one of the statutorily enumerated felonies, "[t]he plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by a court fashioning a sentence outside statutory provisions." Johnson v. State, 679 So. 2d 9, 10 (Fla. App. 4th Dist. 1996), citing State v. Coban, 520 So. 2d 40, 41 (Fla. 1988). Thus, any sentence "outside the statutory provisions" is an, a priori, illegal sentence.

In Bedford v. State, 617 So. 2d 1134 (Fla. 4th DCA 1993), Justice Anstead, then a district court judge, reasoned that to preclude R. 3.800(a) relief because the sentence was previously affirmed on appeal, even though the illegal aspect of the sentence was not challenged, would emasculate the "purpose and usefulness of Rule 3.800." Bedford, 617 So. 2d at 1136. (emphasis added); See and compare, Brown v. State, 664 So 2d 311 (Fla. 1st DCA 1995) at 312; and Bedford v. State, 633 So 2d 13 (Fla. 1994) at 14. Obviously, the aspect of the sentence of which Justice Anstead spoke (in this case, "the prohibition of eligibility for parole"), cannot reasonably be reconciled with the notion that only sentences which exceed the statutory maximum are cognizable for correction under R. 3.800(a). In Jonhson v. State, supra., the Forth District Court, referring to Bedford, stated that, "the supreme court held that the prohibition of eligibility for parole was illegal and struck that portion of the sentence." Id. at 10. (emphasis added). Too, the court held that, "[t]o the extent that the sentences...withhold eligibility for parole...they are similarly illegal and must be corrected." Johnson, at 10. (emphasis added). Again, this

cannot be reconciled with the First, Third, and Fourth District Courts' interpretation that Callaway and Davis only provide R. 3.800(a) relief to those sentences in excess of the statutory maximum. It must be pointed out that this Court did not disturb Michael Bedford's sentence. Thus, since the mandatory "aspect" of Bedford's sentence was otherwise within the statutory maximum, this Court's correction of Bedford's sentence obviously conflicts with the First, Third, and Fourth District's interpretation of Davis and Callaway as reflected in Wickline v. State, 22 Fla. L. Weekly D337 (Fla. 1st DCA January 31st, 1997); Chaney v. State, 678 So. 2d 880 (Fla. App. 3 Dist. 1996); and Orestes v. State, 22 Fla. L. Weekly D595 (Fla. 4th DCA March 5th, 1997), respectively.

The seemingly interchangeable characterizations of an "illegal" sentence as "unlawful" or "erroneous" are little more than legal semantics When, as Judge Altenbernd's dissent in Brown v. State, 633 So 2d 115-17 (Fla. 2d DCA 1994) so clearly illustrates, these terms are variably applied to sentences disparately, justice suffers and the notion of due process of law becomes a useless charade. See, e.g., Davis v. State, supra., citing Judge v. State, supra. Equally noteworthy, the "three (3) different kinds of sentencing errors" described by the en banc court of the Second District in Judge, and again articulated in Callaway, are indefectible in an ideal world. However, an ideal juridical world, though always a goal of court practices, procedures and rules, is never the rule of thumb as practiced at the front lines of the lower courts on a daily basis. Thus, the three (3) types of errors articulated in Judge, and their preferred procedural remedies, are impractical if set in stone and then applied to the many unique and peculiar sentencing situations that, in the real world, defy pigeonholing. Rule 3.800(a) provides a corrective mechanism to the courts for reviewing those predjudicial errors that have fallen through the cracks of the standard collateral review process. To eliminate it from a judge's options would be devastating to procedural due process.

Respondent respectfully submits that the First, Third, and Fourth District Courts of Appeal have miscontrued this Court's rulings in Davis and Callaway. Callaway merely holds that the determination of issues which require an evidentiary hearing "should" ideally be dealt with via Fla. R. Cr. P. 3.850. Besides, this Court could not have intended a mixed reading of Davis and Callaway to vitiate the lower courts' authority to: (1) treat prisoner petitions as if the proper remedy was sought; if, it would be in the interest of justice to do so, Brown v. State, 664 So. 2d 311 (Fla. 1st DCA 1995); (2) to secure the just determination of every case in accordance with the substantive law, Hayes v. State, 598 So. 2d 135, 138 (Fla. 5th DCA 1992); and (3) that courts are duty bound to correct an illegal sentence whenever presented with a motion indicating the sentence is illegal. Raley v. State, 675 So. 2d 170 (Fla. App 5 Dist. 1996). Cf. Stacey v. State, supra. Too, respondent submits that the First, Third, and Fourth District Courts have reluctantly held that Davis and Callaway direct that only sentences in excess of the statutory maximum are cognizable for relief pursuant to R. 3.800(a). See, e.g., Stacey v. State, supra; Gibbs v. State, 22 Fla. L. Weeekly D101 (Fla. 1st DCA December 30th, 1996).

If this Court rules in the case sub judice that R. 3.800(a) can only be utilized to challenge sentences which exceed the statutory maximum, then this Court also overrules that part of Judge Altenbernd's dissent in Brown v. State, 633 So. 2d 112 (Fla. App. 2 Dist. 1994), which sets forth "[e]xamples of proper uses of rule 3.800(a)". Id. at 116 n.2. Thus, with the exception of Judge Altenbernd's cite to "Pinellas v. State, 589 So. 2d 272 (Fla. 5th DCA 1992)(sentence in excess of statutory maximum)[,]" most of the other "[e]xamples of proper uses of rule 3.800(a)" will be overruled by the case at bar. In other words, after Davis and

Callaway, the following cases cited by Judge Altenbernd as proper uses of R. 3.800(a) would no longer be binding since they all involve sentences which don't exceed the statutory maximum:

> Anderson v. State, 584 So. 2d 1127 (Fla. 4th DCA 1991)(retention of jurisdiction on life sentence in excess of time allowed by statute); Owens v. State, 557 So. 2d 199 (Fla. 2d DCA 1990)(imposing more than remaining balance of a true split sentence of probation violation); [see also Gibbs v. State, supra.] Thomas v. State, 611 So. 2d 600 (Fla. 2d DCA 1993)(most errors in jail credit, determinable from records readily available to the court, result in illegal sentences)...

Brown, 633 So. 2d 112 (dissenting opinion)(emphasis added)at 116, n.2.

If a prosecutor now only has to claim that records or witnesses are not readily available in order to properly defeat an otherwise facially sufficient R. 3.800(a) motion to correct an illegal sentence, their incentive to obtain those records is disturbingly obvious. In short, those motions supplementing the record, Zulla v. State, 404 So. 2d 202 (Fla. 2d DCA 1981); Kronz v. State, 462 So. 2d 450 (Fla. 1985); and, e.g., Hopping v. State, 650 So. 2d 1087 (Fla. App. 3 Dist. 1995), or otherwise alleging error "on the face of the record," are likely to fall victim to the caprice of prosecutors and the whim of overworked Judges, and, thus, be arbitrarily denied. Therefore, in the interests of justice, a mixed reading of Davis and Callaway cannot stand for the proposition that only sentences exceeding the statutory maximum are reviewable by way R. 3.800(a If so, such a reading would "emasculate the purpose and usefulness of Rule 3.800" as articulated by current Justice Anstead in Bedford, 617 So. 2d at 1136, and, moreover, upset well established procedural safeguards in the Florida Criminal Justice System set up "to secure the just detemination of every case in accordance with the substantive law." Bedford, supra., and Raley v. State, 675 So. 2d 170 (Fla. App. 5th Dist. 1996), citing Hayes v. State, 598 So. 2d 135, 138 (Fla. 5th DCA 1992).

It seems the argument the petitioner advances turns on the prejudice the state will derive from holding evidentiary proceedings after the two-year filing limitation period permitted under R. 3.850(b). It should be noted however, that respondent filed his sworn motion under R. 3.800(a), citing Judge v. State, supra., maintaining that the determination of whether respondent actually possessed a firearm during the commission of one of the predicate felonies enumerated in §775.087(2) could be made from records readily available to the court. Respondent's assertion along these lines was based on a common sense rationale. That is, it is axiomatic that if no evidentiary proceedings or testimony were required to establish a factual basis to sustain the charge undergirding the plea accepted by the court, from which the challenged illegal sentence arises, then no evidentiary hearing or testimony should be required of a movant to prove or disprove the legality of the sentence in question. Accordingly, if an illegal sentence can be pronounced without evidentiary proceedings or testimony to support it, it would be unconstitutional to require more of a movant challenging an illegal sentence than the state had to bear in obtaining it. Thus, the determination of "actual possession" should be made on the same record evidence used to induce the plea to a non-existent violation of §775.087(2). To do otherwise would be an injust proceeding affecting "life, liberty, or property" without the "fundamental fairness that derives ultimately from the natural rights of all individuals" which comprises the backbone of "due process of law." Steinhorst v. State, 636 So. 2d 498 (Fla. 1994), at 501; See also, Art. 1, § 9, Fla. Const.; Amend. Fourteen, United States Constitution.

Penultimately, a sentencing error that imposes predjudice by extending a prison term beyond that lawfully allowed, is a fundamental error violative of due process whether you label it "unlawful," "erroneous,"

or "illegal." Since such an error endures, and affects life and liberty, it rises to a level of constitutional protection. If a prisoner, therefore, due to illiteracy, inaccessibility to a competent law clerk, or any of a host of other valid possibilities, is unable to discover a sentencing error until two years after his sentence became final, is he forever constrained to endure the error, perhaps for years? Are procedural mechanisms more important than predjudicial sentencing errors which violate fundamental rights? Since sentencing errors do not fit into the category of newly discovered facts as excepted by R. 3.850(b), does this Court intend to hold that the labeling of those errors as "unlawful" or "erroneous" makes such errors irremediable? Respondent submits that due process of law, and all its appurtenances, demand that a sentencing error that affects life, liberty, or property, regardless of what name you give it, is a sentencing error redressable when it's brought to light despite Davis and Callaway! One has only to think of the labyrinthine legal maze that Michael Bedford had to travel before ultimately having this Court correct his sentence via the jurisdictional powers vested in Article V. Section 7 of the Florida Constitution, to envision the future for pro se litigants challenging sentencing errors which have predjudiced them with years in prison beyond what is statutorily permissible.

If strict conservation of judicial resources, the expediency of procedural rules, and adherence to court policies which stress form over substantive law become the foremost concern of courts, then the ability to do justice to an imprisoned person, as Judge Cowart stated there was no better objective to do, is painfully obvious. Wherefore, respondent respectfully requests the Honorable Justices of this Court to let stand the decision of the Second District Court of Appeal in Mancino v. State, 22 Fla. L. Weekly D686 (Fla. 2d DCA March 14th, 1997).

ISSUE TWO

STARE DECISIS IS A RULE OF LAW WHICH HOLDS THAT PRECEDENT MUST BE FOLLOWED EXCEPT WHEN DEPARTURE IS NECESSARY TO VINDICATE OTHER PRINCIPLES OF LAW OR TO REMEDY CONTINUED INJUSTICE. HAAG V. STATE, 591 SO. 2D 614 (FLA. 1992).

Respondent, in the case at bar, made a litigating decision to file a R. 3.800(a) motion, as opposed to a R. 3.850(b)(1) motion citing exceptional circumstances, based on the controlling case precedent established within the jurisdiction of the Second District Court of Appeal. Hubbard v. State, 667 So. 2d 936 (Fla. App. 2 Dist. 1996); Dye v. State, 667 So. 2d 935 (Fla. App. 2 Dist. 1996); Becton v. State, 688 So. 2d 1107 (Fla. App. 2 Dist. 1996); Anfield v. State, 615 So. 2d 853 (Fla. 2d DCA 1993); Poiteer v. State, 627 So. 2d 526 (Fla. 2d DCA 1993); Robinson v. State, 640 So. 2d 1200 (Fla. 2d DCA 1994); Brown v. State, 633 So. 2d 112 (Fla. 2d DCA 1994); Word v. State, 682 So. 2d 642 (Fla. 2d DCA 1996); Butchek v. State, 686 So. 2d 21 (Fla. 2d DCA 1996). Accordingly, the United States Supreme Court has held that stare decisis is the preferred course of action because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Payne v. Tennessee, 111 S.Ct. 2597 (1991), at 2609, citing Vasquez v. Hillery, 474 U.S. 254, 265-266, 106 S.Ct. 617, 624-625 (1986); Cf. Haag v. State, 591 So. 2d 614 (Fla. 1992).

However, it must be noted that a state supreme court is not beholden to precedent set by a court of lower rank, even if the same question of law that has been decided by the court below is in controversy. State v. Mellenberger, 163 Or. 233, 95 P. 2d 709, 719, 720 (1986). Nonetheless, stare decisis means that like facts will receive like treatment in a court of law. Thus, this Honorable Court should not disregard established precedent absent an intervening United States Supreme Court or en banc U.S. Circuit Court of

Appeals decision. See, e.g., Flowers v. United States, 764 F.2d 759 (11th Cir. 1985); Monroe County, Florida v. U.S. Dept. of Labor, 690 F. 2d 1359, 1363 (11th Cir. 1982).

Generally, the doctrine of stare decisis "is often expressed to the effect that when a point of law has been settled...it forms a precedent which is generally not afterwards to be departed from." 13 Fla. Jur. 2d, Courts and Judges § 136, citing, e.g., State v. Lott, 286 So. 2d 565 (Fla. 1973); State v. Dwyer, 332 So. 2d 333 (Fla. 1976). This principle of long standing jurisprudence "was recognized by the Second District Court of Appeal in Hall v. State, 302 So. 2d 785 (2nd DCA 1974):

> ...whether we agree with the decision of the Supreme Court...we must follow it. To quote our erstwhile brother, Judge Mann, in Johnson v. Johnson, Fla. App. [2nd Dist] 1973, 284 So 2d 281, we receive the interpretation of the law from our Supreme Court, agreeing with some, disagreeing with some, following all...."

State v. Dwyer, 332 So. 2d at 335 (internal quotations ommitted).

As this Honorable Court itself has reasoned, the doctrine of stare decisis requires great deference to precedent unless the "demands of justice and[/or] the principles of constitutional law...require an alteration in the precedent." Haag v. State, 591 So. 2d 614 (Fla. 1992), at 618. (emphasis added).

Judge Lazarra, who wrote the opinion for the Second District Court in the decision now under this Court's review, eloquently analyzed the doctrine of stare decisis in Wood v. Fraser, 677 So. 2d 15 (Fla. 2d DCA 1996), as follows:

> [C]ourts...do not create precedent. State v. Bamber, 592 So. 2d 1129, 1132 (Fla. 2 DCA 1991), approved, 630 So. 2d 1048 (Fla. 1994). Although...free to express ...

> disagreement with decisions of higher courts, trial courts are not free to disregard them in the adjudicatory process. See Hernandez v. Garwood, 390 So. 2d 357, 359 (Fla. 1980). We emphasize, therefore, in accord with the doctrine of stare decisis, that once a point of law has been decided by a judicial decision, it should be adhered to by courts of lesser jurisdiction, until overruled by another case, because it establishes a precedent to guide the courts in resolving future similar cases. See In re Seaton's Estate, 154 Fla. 446, 449, 18 So. 2d 20, 22 (1944). Bunn [v. Bunn] 311 So. 2d at 387 [(Fla. 4th DCA 1975)]. Any deviation from this fundamental tenet of jurisprudence can only result in an erosion of the rule of law, thereby causing uncertainty and unpredictability in the resolution of judicial disputes, as well as a needless expenditure of litigant and judicial resources. See Hernandez, 390 So. 2d at 359; Bamber, 592 So. 2d at 1132.

Wood v. Fraser, at 19.

The issue at bar, i.e., whether R 3.800(a) is the proper procedural mechanism to challenge imposition of a three (3) year minimum mandatory, if found by this Court not to be the proper legal tack, has already been "correct[ed] through legislative action" and amendments by this Court to the Florida Rules of Criminal and Appellate Procedure, See, e.g., Payne v. Tennessee, 111 S.Ct. at 2610; Burnet v. Coronado Oil & Gas Co., 52 S.Ct. 443 (1932), at 447; Cf. Criminal Procedure and Corrections - Criminal Reform Act, §924.051, Ch. 96-248, Fla. Stat. (Supp. 1996); Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So. 2d 1375-1376 (Fla. 1996), as amended in 685 So. 2d 1253, 1270-1271 (Fla. 1996), and 685 So. 2d 773, App. 782-783 (Fla. 1986); Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, App. 799-807 (Fla. 1996). As Judge Lazarra so compendiously put it: "we are mindful of the recent amendments...relating to unlawful and illegal sentences in which the supreme court has sent a clear and definite signal that it intends for issues involving...sentences to be presented expeditiously to the trial court and appellate courts of this state for immedi-

ate resolution." Mancino v. State, 22 Fla. L. Weekly d686 (Fla. 2d DCA March 14th, 1997). Thus, since the United States Supreme Court has ruled that stare decisis should be adhered to and, that the proper forum for addressing procedural deficiencies is to "correct [them] through legislative action," this issue before the Court is essentially moot at this point. All litigants since the passage of the Criminal Appeal Reform Act, are constrained to file "for collateral or other postconviction relief" within "2 years after the judgment and sentence became final in a non-capital case." §924.051, Fla. Stat. (1996).[1] In essence, there is no palpable need to rule negatively on an issue, upset precedent, and recede from the doctrine of stare decisis to address that which has already been "correct[ed] by legislative action." Payne v. Tennessee, 111 S.Ct. at 2610 (1991); Burnet v. Coronado Oil & Gas Co., 52 S.Ct. at 447 (1932). Moreover, since a negative ruling against the respondent in the case sub judice will not affect the litigants who were already provided redress under the same set of facts (in the case of White v. State, 22 Fla. L. Weekly D350 (Fla. 2d DCA Feb. 28th. 1997), only two weeks before respondent)), the equal protection of the laws doctrine may be implicated if, essentially, this Court makes a ruling in this case which denies this respondent relief because he was unable to file for collateral relief within two years due to the fact that he was incarcerated in a foreign jurisdiction. In the case at bar, respondent made a valid litigating decision based on the controlling case precedent within the jurisdiction in which he filed. In fact, if respondent filed his action 12 days, 12 months, or 12 years after his sentence became final, he still would have filed a R. 3.800(a) motion since it was the procedure established within the Second District

---

1/ As in respondent's case, if the "facts upon which the claim is predicated were unknown to the petitioner...or could not have been ascertained by the exercise of due dilligence," an exception to the two-year filing limitation is provided by statute. See Chap. 96-248 §4; §924.051(6)(a); See also, Respondent's ISSUE THREE, infra.

Court of Appeal. Thus, without the "stability to law and to the society governed by the law," State v. Gray, 654 So. 2d 552 (Fla. 1995), which the doctrine of stare decisis provides, a litigant (especially one proceeding in propia persona) would have to depend upon the fickle wind of juristic vicissitude whereby, warily, the litigant would be forced into the tenuous position of having to constantly trim his pleadings to catch every shift of the procedural breeze. Thus, "stare decisis does not operate so as to unravel, each time a new decision is announced [as in Davis and Callaway], the intricate tapestry of individual judgments already made final and...new precedent does not nullify prior judgments...or issues already presented, decided, and resolved." Ute Indian Tribe v. State of Utah, 935 F. Supp. 1473 (D.Utah 1996). Therefore, it is the respondent's position that since the issue sub judice has been addressed by legislative and supreme court action in §924.051 and the aforementioned amendments to Florida criminal and appellate procedure, fundamental fairness dictates that there should be some form of judicial grace allowing those litigants whose crimes were committed before the statute's and amendments' enactment (as well as before the Davis and Callaway decisions) to litigate their cases in accordance with the well established precedent. Wherefore, this Honorable Court should answer the certified question in the negative and let the decision of the Second District Court of Appeal stand undisturbed.

ISSUE THREE

WHERE A "SENTENCING ERROR CAN CAUSE OR REQUIRE A DEFENDANT TO BE INCARCERATED OR RESTRAINED FOR A GREATER LENGTH OF TIME THAN PROVIDED BY LAW IN THE ABSENCE OF THE SENTENCING ERROR, THAT ERROR IS FUNDAMENTAL AND ENDURES AND [MOVANT] IS ENTITLED RELIEF IN ANY AND EVERY LEGAL MANNER POSSIBLE...." HAYES V. STATE, 598 SO. 2D 135 (FLA. APP. 5 DIST. 1992).

If this Court ultimately decides that imposition of a three (3) year minimum mandatory pursuant to §775.087(2) absent any factual basis to establish a proper plea therefor is an "unlawful" sentence as opposed to an "illegal" sentence and, thus, procedurally assailable only by way of Fla. R. Cr. P. 3.850, then respondent's pro se motion should have been treated by the trial court "as if the proper remedy was sought." Brown v. State, 664 So. 2d 311, 312 (Fla. 1st DCA 1995). Thus, it is well established that, "[t]he courts have the authority to treat prisoner petitions as if the proper remedy were sought if it would be in the interest of justice to do so." Brown v. State, supra., at 310, citing to Hall v. State, 643 So. 2d 635 (Fla. 1st DCA 1994); See also, Dublin v. State, 681 So. 2d 865 (Fla. App. 5 Dist. 1996); Cf. Art. V, §3(b)(7), Florida Constitution; Kilgore v. Bird, 149 Fla. 570, 6 So. 2d 541 (1942), at 544-45.

In the case at bar, respondent filed a Motion to Correct an Illegal Sentence pursuant to Fla. R. Cr. P. 3.800(a), involving jail credit on December 11th, 1996. (Ex. "A"). Approximately two (2) weeks later, on December 23rd, 1996, respondent, after carefully researching the legal bases, rules, and case precedent relevant to challenging an improper imposition of a three (3) year minimum mandatory pusuant to §775.087(2), filed the sworn Rule 3.800(a) motion now under review by this Court.

Respondent filed the motion sub judice in accordance with the controlling precedent within his appelate district, See, e.g., Word v. State, 682 So. 2d 642 (Fla. 2d DCA 1996); Butchek v. State, 686 So. 2d 21 (Fla. 2d DCA 1996). Thus, respondent respectfully submits that he should not now be penalized as a result of other courts' interpretation of this Court's decisions in Davis and Callaway; that is to say, that Davis and Callaway preclude relief under the Florida Rule of Criminal Procedure by which respondent filed. Indeed, respondent could have moved the trial court under Fla. R. Cr. P. 3.850(b)(1), citing exceptional circumstances. In light of the fact that respondent was out of the jurisdiction due to his imprisonment in the State of New Jersey since May 1985, he could not, despite the exercise of "due diligence," have ascertained the rules of criminal procedure, case law, legal bases, or facts necessary to properly have filed a R. 3.850 motion within the two-year limitation period contemplated by R. 3.850(b). Too, respondent could have made a showing that since his sentence became final, he was within the jurisdiction of the court for a total of approximately 460 days; well within the two-year filing limitation period set forth in R. 3.850(b). Nothwithstanding that respondent could have filed a viable R. 3.850(b)(1) motion, his litigating decisions were guided by the precedent within his district. Stated another way, the controlling case law within the Second District Court of Appeal consistently has held that R. 3.800(a) is the proper vehicle for challenging imposition of a three (3) year minimum mandatory in the absence of a factual basis to support the plea and sentence. See, Anfield v. State, 615 So. 2d 853 (Fla. 2d DCA 1993). Finally, and again, respondent's R. 3.800(a) motion sub judice was filed with an unnotarized oath attached thereto.[1]

1/ 28 U.S.C. § 1746 clearly sets forth that any written matter required to be "supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement...with like force and effect, be supported...by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him as true under perjury, and dated, in substantially, the following form:

It must be noted, moreover, that circumstances such as respondent's, i.e., the inability to properly litigate a state criminal case while incarcerated in another state far away from the jurisdiction in which the challenged case was docketed, has been found by the federal courts to establish "cause" to overcome a state procedural bar claiming non-exhaustion of state remedies. See, e.g., Dulin v. Cook, 957 F. 2d 758 (10th Cir. 1992) at 759, 760 (petitioner's claim that since he was incarcerated in a foreign jurisdiction and unable to ascertain state appellate rules, states a claim for cause under the "cause and prejudice" standard. See Coleman v. Thompson, 111 S.Ct. 1454, 1470 (1991)). Respondent's set of exceptional circumstances serve to underscore the proposition that, "[t]he courts have the authority to treat prisoner petitions as if the proper remedy were sought if it would be in the interest of justice to do so." Brown v. State, 664 So. 2d 311 (Fla. App. 1 Dist. 1985), citing Hall v. State, 643 So. 2d 635 (Fla. 1st DCA 1994); See also, Dublin v. State, 681 So. 2d 865, 866 (Fla. App. 5 Dist. 1996)(permitting an untimely 3.800 motion to proceed as a R. 3.850 after leave to amend with sworn oath).

Respondent was incarcerated approximately 1200 miles from the State of Florida between April of 1985 and March 12th, 1996, when he was trans-

---

(footnote 1 continued from previous page)

> ...(2) If executed within the United States.... I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.
>
> Executed on (date).
>
> (signature)." 28 U.S.C.A. § 1746, at

406. In the case at bar respondent filed his R. 3.800(a) motion with the following certification: "I HEREBY CERTIFY by my signature below that the instant motion is true and correct and, if wilfully false, I am subject to punishment for perjury. Too, that a copy...has been furnished...to the above-listed parties on this 23rd day of December, 1996."

BY: (signature)

Thus, the pleading in question is a properly sworn motion within the meaning of 28 U.S.C. §1746. Moreover, it is "substantially" in the form delineated in Chapter 92.525, Florida Statutes; State v. Shearer, 628 So. 2d 1102 (Fla. 1992).

ported back into Florida's judicial jurisdiction. The prison law library that respondent had access to during his New Jersey confinement was not equipped with any computerized legal research capablities such as Lexus or West Law. The law library stacks were comprised of New Jersey criminal law reports and the standard federal series. Respondent was indigent and unable to hire a Florida Attorney to litigate the case(s) underlying his Florida prison sentence. Equally noteworthy, respondent lost all his Florida-related legal papers, case numbers, etc., when he escaped. Too, respondent's repeated queries to the Pinellas County Court Clerk seeking to ascertain case numbers, filing rules, and any information relevant to the instant conviction and sentence undergirding the Florida detainer lodged against him in New Jersey, went unanswered. Thus, when a movant can demonstrate that the facts, legal bases, or rules upon which the petition is predicated could not be ascertained, depite the exercise of due diligence "such motions may be filed outside the two-year time limitation." Lowe v. State, 673 So. 2d 927 (Fla. App. 5 Dist. 1996), at 928, n.1, citing Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994); Kinsey v. State, 155 Fla. 159, 19 So. 2d 706 (1944); Lamb v. State, 91 Fla. 396, 107 So. 535; Branum v. State, 514 So. 2d 422 (Fla. App. 2 Dist. 1987).

Respondent respectfully submits that it could not have been this Court's intent of its rulings in Davis and Callaway to "mousetrap" this respondent into a time-consuming procedural quagmire.[2] This is especially so when this Court considers the fact that the respondent merely made a proper litigating decision to file a R. 3.800(a) motion in accordance with the controlling case precedent within the district in which his conviction arose. Poiteer v. State, 627 So. 2d 526 (Fla. 2d DCA 1993); Cf. Young v. State, 619 So. 2d 378 (Fla. App. 2 Dist. 1993)(trial court was correct to

2/ For an insightful analysis of the concept of "mousetrapping" vis-a-vis litigating decisions, See, Burris v. Parke, 948 F. Supp. 1310 (N.D. Ind. 1996), 1317, n.2

treat writ of error coram nobis as a motion under R. 3.850). Too, all courts are to hold pro se petitions to less stringent standards than formal pleadings drafted by lawyers. Hughes v. Rowe, 449 U. S. 5, 9, 101 S.Ct. 173 (1980), citing Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594 (1972). To support the respondent's position that he should be allowed some judicial grace considering his special circumstances, one has only to look at the Fifth District Court's reasoning vis-a-vis pro se prisoner petitions:

> The fact that appellant, proceeding without a lawyer, says he is entitled to relief under Florida Rule of Criminal Procedure 3.800 (rather than 3.850), does not give the court the authority to deny a request to correct an illegal sentence both because R. 3.800(a) gives the trial court the authority to at any time correct an illegal sentence and because the court can on its own decide the proper rule to use to correct the sentence. In this case the most proper rule would be Rule 3.850 because it requires [emphasis in original] the court to correct the illegal sentence.

DeSantis v. State, 400 So. 2d 525 (Fla. 5th DCA 1981), at 525 (emphasis added).

The respondent advances the following to assist this Honorable Court with a just decision in the case at bar. First, respondent made a valid litigating decision not to set forth why his motion was filed twelve (12) years after his sentence became final because under R. 3.800(a), a motion that is properly filed "at any time," those facts were inapposite to the pleading. Secondly, respondent filed an extensive motion and brief to the same court nineteen (19) days prior to his filing of the motion sub judice wherein he set forth that he escaped in 1984, was imprisoned in New Jersey in early 1985, and was returned to Florida pursuant to the same court's capias warrant on March 12th, 1996. (Ex. "A"). Said brief was accompanied by a comprehensive appendix containing official documentation verifying the respondent's case history.[3] Moreover, it can be healthily reasoned that

3/ The state has filed a notice to invoke the discretionary jurisdiction of this Honorable Court in this case on April 30, 1997. Thus, the brief and appendix filed in this case are now part of this Court's record. The issue again turns on the proper use of R. 3.800(a).

that the trial court knew or should have known these facts since a hearing was held before the Honorable Joseph Donahey on April 19th, 1996, where respondent's case history was outlined to an understandably curious judge by the state attorney and respondent's court-appointed counsel (as well as respondent pro se). In short, the respondent needed only to reference the twelve year gap in litigation if he was filing under R. 3.850(b)(1). Since respondent was filing under R. 3.800(a), in accordance with the prescription circumscribed by the well established case precedent, facts relating to time limitations were irrelevant. See, e.g., Dye v. State, 667 So. 2d 935 (Fla. App. 2 Dist 1996); Hubbard v. State, 667 So. 2d 936 (Fla. App. 2 Dist. 1996); Robinson v. State, 640 So. 2d 1200 (Fla. 2d DCA 1994). When, therefore, respondent relied upon the controlling case law to make a litigating decision, he should not be penalized for that decision on the basis that it was erroneous. In essence, respondent's choice, while clearly prejudicing his litigation (in view of this case's status, that is, being litigated in yet another court, with the unnecessary expenditure of time and resources that that comprehends), cannot be termed a self-inflicted tactical error when, in fact, no error on the respondent's part was made.

In view of respondent's case history, and the trial court's refusal to treat the petition sub judice as if the proper remedy was sought,[4] this Court is vested with the power under Article Five, Section 3(b)(7) of the Florida Constitution to issue a writ directing the trial court to proceed with respondent's sworn R. 3.800(a) motion as if filed under R. 3.850(b). Respondent avers that he would have been released two months ago -- with

4/ In State v. Robinson, 640 So. 2d 1200 (Fla. App. 2 Dist. 1994), the 2d DCA noted that "[t]he trial court treated the [R. 3.800(a)] motion as one requesting postconviction relief pursuant to [Rule] 3.850 and denied it as untimely." Id. at 1200. This is a case on point with respondent's with the exception that the trial court never even endeavored to treat his motion as if filed under R. 3.850(b).

basic and incentive gain-time awards under Waldrup v. Dugger, 562 So. 2d 688 (Fla. 1990) -- had the trial court made the proper determination that respondent was unarmed when he committed the predicate crime of burglary. Thus, it is in the interest of justice if this Court decides to issue the appropriate writ instead of forcing the respondent into the tenuous position of having to refile under Rule 3.850(b)(1). See, e.g., Richardson v. State, 546 So. 2d 1037, 1038-39 (Fla. 1989); Branum v. State, 514 So. 2d 422 (Fla. App. 2 Dist. 1987); Cf. Robinson v. State, supra.; Bedford v. State, 633 So. 2d 13 (Fla. 1994).

In support of respondent's plea for this Court's "extraordinary writ," the respondent again avers that his original R. 3.800(a) motion was properly sworn pursuant to 28 U.S.C. § 1746. Moreover, respondent's unnotarized oath comports with the spirit as well as the meaning of this Court's holding in State v. Shearer, supra.[5] Thus, an order directing the trial court to treat respondent's motion as if filed under R. 3.850(b)(1) is well within the meaning and spirit of the "organic power of [this Honorable Court] to issue writs necessary or proper...without any limitation on the discretionary powers...as to use of such writs." Art. V., § 3(b)(7);[6] Kilgore v. Bird, 149 Fla. 570, 6 So. 2d 541 (1942); Cf. Bedford v. State, 633 So. 2d 13 (Fla. 1994); Richardson v. State, 546 So. 2d 1037 (Fla. 1989).

Wherefore, in the interest of justice, respondent respectfully requests this Honorable Court to issue an order directing the trial court to treat respondent's sworn R. 3.800(a) motion sub judice as if filed under R. 3.850(b)(1).

5/ The First District, in a similar case, held that "[o]ur review of [Hall's R. 3.800(a)] motion reveals that it complies with...the requirement that the motion be made under oath...' Hall v. State, supra.

6/ This provision to issue "all writs" especially contemplates those situations in which the Court has acquired jurisdiction on an independent basis. See, Shevin ex rel. State v. Public Service Commission, 333 So 2d 9 (1976).

CONCLUSION

Based on the foregoing facts and points of law, respondent respectfully prays this Honorable Honorable Court to either answer the certified question in the negative and adopt the positions of the Second and Fifth District Courts on this issue or, in the alternative, issue a writ directing the trial court to treat respondent's sworn Rule 3.800(a) motion sub judice as if filed under Rule 3.850(b)(1). Wherefore, respondent prays that this Honorable Court grant the relief herein sought.

BY: Joseph Sal Mancino

JOSEPH SAL MANCINO, pro se
DC#165264 (E2-121S)
Apalachee Correctional Institution
P.O. Box 699-West Unit
Sneads, Florida 32460

DATED: May 7th, 1997

VERIFICATION

The undersigned respondent, Joseph Sal Mancino, pro se, DECLARES UNDER PENALTY OF PERJURY that the foregoing Response Brief on the Merits has been read him and the facts contained therein have been found to be true and correct to the best of his knowledge and, if wilfully false, he is subject to punishment pursuant to the applicable laws. Chapter 92.525, Florida Statutes (1994), 28 U.S.C. § 1746; Cf. 18 U.S.C. § 1621; See also, State v. Shearer, 628 So. 2d 1102 (Fla. 1994).

BY: Joseph Sal Mancino

JOSEPH SAL MANCINO, pro se
DC#165264 (E2-121S)
Apalachee Correctional Institution
P.O. Box 699-West Unit
Sneads, Florida 32460

DATED: May 7th, 1997

CERTIFICATE OF MAILING AND
INVOCATION OF THE "MAILBOX RULE"

The undersigned respondent, Joseph Sal Mancino, pro se, HEREBY CERTIFIES that the foregoing Response Brief on the Merits was placed, as evidenced by the Apalachee Correctional Institution "Mailroom Log Sheet," in the hands of prison officials (with postage pre-paid) on May 7TH, 1997; and, since this document was delivered into the custody of prison officials on said date, and since respondent is proceeding in propria persona, said document is to be treated as filed as of May 7th, 1997, pursuant to the United States Supreme Court ruling in Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 2382 (1988), as interpreted by the Florida Supreme Court in Haag v. State, 591 So. 2d 614 (Fla. 1992).

BY: Joseph Sal Mancino
JOSEPH SAL MANCINO, pro se
DC#165264 (E2-121S)
Apalachee Correctional Institution
P.O. Box 699-West Unit
Sneads, Florida 32460

DATED: May 7TH 1997

CERTIFICATE OF SERVICE

The undersigned respondent, Joseph Sal Mancino, pro se, HEREBY CERTIFIES that a true and correct copy of the foregoing Response Brief on the Merits (and four [4] Exhibit Appendix) has been forwarded by pre-paid First Class U.S. Postal Service to my adversaries in this matter, Mr. Robert J. Kraus, Senior Assistant Attorney General, Chief of Criminal Law; and, Mr. Ronald Napolitano, Assistant Attorney General, at Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida, 33607-2366, on this 7th day of May, 1997.

BY: Joseph Sal Mancino
JOSEPH SAL MANCINO, pro se