012

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

Case No. 90,516

JOSEPH SAL MANCINO,
aka Joseph Sal Mancino,
aka Paul Nicholas Reno,
aka Paul Nicholas Christo,
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

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Joseph Sal Mancino, pro se
on the Brief

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OTHER AUTHORITIES

Fla. Const. Art. V., § 3(b)(7)

Fla. Rules Crim. Pro. 3.800(a) & 3.850(b)

Fla. Stat. § 161.121(1)

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STATEMENT OF THE CASE AND FACTS

Petitioner, the State of Florida (hereinafter referred to as "petitioner"), correctly states that respondent was sentenced on February 17th, 1984, following entrance of nolo contendere pleas on Pinellas County Criminal case numbers CRC8207302CFANO-D and CRC8304651CFANO-D. (See petitioner's merit brief, at p. 1). The aggregate prison term imposed by Judge Maynard F. Swanson for the five counts encompassed within the aforementioned criminal case numbers was four (4) years in state prison, with a three (3) year minimum mandatory pursuant to 775.087(2), Florida Statutes (1983). It must be noted that the sentences on all counts began to run on the same date (February 17th, 1984) and reflect the identical length of incarceration (4 years), with the exception of Count 1 of case number 83-04651 to which a three-year firearm mandatory attaches. In essence, the controlling sentence is the four (4) year (w/three-year minimum mandatory) prison term imposed on Count 1 of case number 83-04651. Stated another way, since all sentences began to run on the same date, comprehending the same length of confinement, the four (4) other counts of four (4) years are subsumed by the controlling sentence rendered on Count 1 of case number 83-04561 because of the three-year firearm mandatory.

Sixty-one (61) days after sentencing on February 17th, 1984, respondent escaped custody. Respondent immediately left the jurisdiction of Florida to reside in Phoenix, Arizona, where, on April 21st, 1985, respondent was arrested by federal authorities pursuant to a 1978 New Jersey criminal warrant. Respondent signed a waiver of extradition fqr the New Jersey detainer and consequently returned to New Jersey on May 5th, 1985. Respondent was then tried, convicted, and sentenced to an aggregate term of twenty-five (25) years imprisonment. Respondent served approximately twelve (12) years before being paroled on January llth, 1996, to a 1984 Florida capias warrant. While

incarcerated in New Jersey, respondent was unable to ascertain, despite the exercise of due diligence, any facts, case numbers, procedural mechanisms, or case law necessary to prosecute either a direct appeal or postconviction collateral attack challenging any aspect of the judgments of conviction rendered on case numbers 82-07302 and 83-04651. Respondent was received into the Florida Department of Corrections on March 12th, 1996.

Approximately nine (9) months after respondent studied the applicable Florida laws and procedures, he filed a Rule 3.800(a) seeking an order crediting him with all pre-sentence and post-sentence county jail time accrued against case numbers 82-07302 and 83-04651. (See Record on Appeal). Said motion was denied on January 21st, 1997. Respondent timely filed a notice of appeal to the Second District Court of Appeal on January 21st, 1997. The Second DCA reversed the trial court's denial order and remanded the case back to the lower court "to consider the merits of Mancino's motion." See Mancino v. State, 22 Fla. L. Weekly D1037 (Fla. 2d DCA April 25th, 1997). The Second District Court of Appeal certified conflict with other district courts of appeal. The State of Florida thus timely filed a "Notice to Invoke Discretionary Jurisdiction" of this Honorable Court on April 30th, 1997. This appeal, brought by the State of Florida, thus follows.

In all other respects respondent relies on the "Statement of the Case" and the "Statement of the Facts" set forth in his "Motion for an Order Awarding County Jail Credit Pursuant to Rule 3.800(a)" which underlies this appeal.

SUMMARY OF THE ARGUMENT(S)

ISSUE ONE:

At least as far back as the decision of the Second District Court of Appeals in Osteen v. State, 406 So. 2d 1239 (Fla. App. 2 Dist. 1981), the courts of this State have recognized that a "motion for correction of sentence" is a proper vehicle to challenge "most errors in jail credit[] determinable from records readily available to the Court[.]" See Brown v. State, 633 So. 2d 112, 116 n. 2 (Fla. App. 2 Dist. 1994)(Altenbernd, J., dissenting), citing Thomas v. State, 611 So. 2d 600 (Fla. 2d DCA 1993). Thus, jail credit issues not involving questions of fact which are necessarily determined via an evidentiary hearing, can be addressed under Rule 3.800(a) without running afoul of the Florida Supreme Court's holdings in Davis v. State, 661 so. 2d 1193 (Fla. 1995) and State v. Callaway, 658 So. 2d 983 (Fla. 1995). This is so because jail credit is statutorily provided for as "a result of the 1973 legislative amendment of 921.161(4), Florida Statutes (1973)."

ISSUE TWO:

Since section 921.161(1), Florida Statutes (1979), provides that a 'court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before [the date said] sentence" is imposed, respondent is statutorily entitled to receive credit for an aggregate 544 days he actually "spent in the county jail" prior to his sentencing on February 17th, 1984. Because respondent's five (5) concurrent four-year sentences were imposed on the same date and run for the same length of time, the 544 days (266+278) respondent actually spent in the county jail prior to sentencing is plainly consistent with this Court's holding in Daniels v. State, 491 So. 2d 543 (Fla. 1986), "that when, pursuant to section 921.161(1), a defendant receives pre-sentence jail-time credit on a sentence that is to run concurrently with other sentences, those sentences must also reflect the credit for time served." Id. at 545. (emphasis in original).

ISSUE THREE:

The Florida Supreme 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 Rule 3.800(a) motion underlying this appeal (which was properly sworn) as if it was filed pursuant to Rule 3.850(b). In the alternative, this Court can issue a writ awarding all jail credit it deems proper based on the record before it on appeal. Respondent will argue that the interests of justice merit the issuance of this Court's extraordinary writ because, in the case at bar, respondent would have been released over two (2) months ago had the court made the proper jail credit determination and, more importantly, any further delays in litigation in this matter would be to the detriment of respondent's personal liberty.

MEMORANDUM OF LAW

ISSUE ONE:

FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a) HAS LONG BEEN RECOGNIZED AS A PROPER PROCEDURAL MECHANISM FOR CHALLENGING "ERRORS IN JAIL CREDIT[] DETERMINABLE FROM RECORDS READILY AVAILABLE TO THE COURT." BROWN V. STATE, 633 SO. 2D 112, 116 n.2 (FLA. APP. 2 DIST. 1994)(ALTENBERND, J., DISSENTING).

After this Court's decisions on July 20th, 1995, in State v. Callaway, 658 So. 2d 983 (Fla. 1995) and Davis State, 661 So. 2d 1193 (Fla. 1995), the First, Fourth, and Fifth District Courts of Appeal have held, as petitioner avers, that "the failure to give proper credit for county jail time served cannot be raised in a post-conviction action pursuant to Fla. R. Cram. [sic] Pro. 3.800(a) unless the defendant [makes a showing] that the denial of such credit will result in [the movant] serving a sentence which exceeds the statutory maximum for the offense." (Petitioner Merit Brief, at p. 4). See also Berry v. State, 684 So. 2d 239 (Fla. 1st DCA 1996); Sullivan v. State, 674 So. 2d 214 (Fla. 4th DCA 1996); Chaney v. State, 678 So. 2d 880 (Fla. 5th DCA 1996).[1] However, the Second and Third District Courts of Appeal have conversely held that "the failure to award appropriate [jail] credit time is an illegal sentence which may be corrected at any time." Knox v. State, 22 Fla. L. Weekly 1079 (Fla. 3rd District April 30th, 1997). See generally Becton v. State, 668 So, 2d 1107 (Fla. App. 2 Dist. 1996); Hopping v. State, 650 So. 2d 1087 (Fla. 3rd DCA 1995); Thomas v. State, 611 So. 2d 600 (Fla. 2d DCA 1993).

But it is significant to note that the First, Fourth, and Fifth Districts have held prior to Davis and Callaway that jail credit issues are statutorily guaranteed and a sentence is illegal if it does not reflect properly calculated pre-sentence county jail credit. Moorer v. State, 556 So. 2d 778 (Fla. 1st

1/ In fact, the Sullivan court certified the following question (which, if answered, would make the instant appeal moot) to this Honorable Court on June 5th, 1996:

> DOES STATE V. DAVIS, 661 SO. 2D 1193 (FLA. 1995), APPLY TO MOTIONS FILED UNDER RULE 3.800 REQUESTING JAIL CREDIT SO THAT SUCH MOTIONS MAY NOT BE RAISED WHERE THE SENTENCE WOULD NOT EXCEED THE MAXIMUM SENTENCE ALLOWED BY LAW?

DCA 1990)("a sentence which does not allow for proper credit is an illegal sentence"); Morgan v. State, 557 So. 2d 605 (Fla. 1st DCA 1990); Martin v. State, 525 So. 2d 901 (Fla. 5th DCA 1988)(en banc)("a sentence is illegal if it fails to allow a defendant credit on all time spent sentences for all time spent in the county jail before sentencing. Consequently, the matter is one which may be raised at any time pursuant to Florida Rule of Criminal Procedure 3.800(a)"); Thomas v. State, 667 So. 2d 441 (Fla. App. 4 Dist. 1996)("it is well settled that jail time and prison credit issues may be raised pursuant to rule 3.800(a)..."); See also Miller v. State, 297 So. 2d 36, 38 (Fla. App. 1 Dist. 1974)("adopt[ing] the procedure for applying [921.161(1)] in the First District"); Kronz v. State, 462 So. 2d 450 (Fla. 1985)(foreign jail credit while defendant is held on 'Florida charge, detainer, or warrant" is squarely within discretion of trial court); Schmidt v. State, 530 So. 2d 1068 (Fla. App. 1 Dist. 1988).

It is important to analyze the provenance of this Court's holdings in Davis and Callaway which have caused the various district courts to interpret that R. 3.800(a) only applies to attack a sentence exceeding the statutory. maximum. In Callaway, this Court cited to the (en banc) Second District Court of Appeal's definition of "three different types 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; (3) an 'illegal sentence' which the error must be corrected as a matter of law in a rule 3.800 proceeding." Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991)(En banc) review denied 613 So. 2d at 1198a v i s v. State, 661 So. 2d at 1198 (Shaw, J., dissenting) ("an illegal sentence imposed by the [court] means just what it says: a sentence that is in clear violation of established law at the time it was imposed"). (internal quotat- marks omitted). However, Judge Altenbernd noted, writing for the full

court in the "Opinion on Rehearing En Banc," that:

> It might be helpful if lawyers and judges referred to sentencing errors that are correctable only on direct appeal as "erroneous sentences." Likewise, sentencing errors that are correctable only after an evidentiary hearing under rule 3.850 would be "unlawful sentences." This would reserve the term "illegal sentence" for use only under circumstances in which the error must be corrected as a matter of law, even in a rule 3.800 proceeding. We admit, however, that this precision would be difficult, even for this court to obey consistently. It is perhaps enough if lawyers and judges keep in mind that these distinctions do exist for good jurisprudential reasons and may affect the relief available at various stages postconviction.

Judge, 596 So. 2d at 76-77 (emphasis added).

In Davis, the court merely found that "the failure to file written findings for a departure [does not] constitute[] an illegal sentence. Only if [said] sentence exceeds the maximum allowed by law would the sentence be illegal." Davis v. State, 661 So. 2d at 1196. In Callaway, this Court recognized that "[a] rule 3.800(a) motion can be filed at any time...and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary hearing." Callaway, 658 so. 2d at 968. Because the Callaway case dealt with factual issues, the "resolution of [which would] require an evidentiary determination and thus should be dealt with under rule 3.850 which specifically provides for an evidentiary hearing[,]" its holding is not applicable to a case involving jail credit issues "determinable from records readily available to the court" because such a case solely requires the resolution of legal issues. See, e.g., Thomas v. State, 611 So. 2d 600 (Fla. 2d DCA 1993); Becton v. State, 668 So. 2d 1107 (Fla. App. 2 Dist. 1996); Martin, v. State, 525 So. 2d 901, 902 (Fla. App. 5 Dist. 1987)(en banc). In short, this Court only addressed the viability of R.3.800(a) to the facts specifically presented to the Court by Davis and Callawap.

Based on the foregoing brief analysis, respondent respectfully submits that the decisions this Court rendered in Davis and Callaway do not diminish the scope of review under R. 3.800(a) to the extent that issues of law involving county jail credit are now procedurally barred under said rule. See, e.g., Zygadlo v. State, 681 So. 2d 309 (Fla. App. 5 Dist. 1996). Stated another way, Davis and Callaway only recognize that issues necessitating an evidentiary hearing to resolve factual disputes are better addressed in a rule 3.850 proceeding. Callaway, at 988.

In the case at bar, respondent's rule 3.800(a) motion plainly declares that the issues presented can be determined both from (1) the court's own records, (See respondent's R.3.800(a) motion at p. 11, et al., citing Thomas v. State, 611 So. 2d 600 (Fla. App. 2 Dist. 1993) and Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991)); and (2) the official documentation supplied by the respondent in his twenty-one (21) exhibit appendix accompanying the R. 3.800(a) motion underlying this appeal. See, e.g., Payne v. Circuit Court for 15th Judicial Circuit, 439 So. 2d 1001 (Fla. App. 4 Dist. 1983); Osteen v. State, 406 So. 2d 1239 (Fla. App. 2 Dist. 1981). In fact, the petitioner seems to concede the bona fides of both the pre-sentence credit,[2] and the 122 days post-sentence credit applied for by way of the respondent's 3.800(a) motion sub judice. (Petitioner's Merit Brief, pp. 8,9). Thus, no factual matters are disputed in the case at bar. Consequently, the specified periods of confinement and the amount of days implicated by respondent's R. 3.800(a) motion are not matters requiring resolution by way of an evidentiary hearing. Too, petitioner does not contest these factual issues, but instead argues either that R. 3.800(a) is not the proper procedural mechanism to challenge jail credit issues in light of Davis and Callaway, or, that "[r]espondent is

2/ It is important to clarify that the state still argues the legal issue relevant to how the pre-sentence credit should be calculated vis-a-vis respondent's concurrent sentences. (See Petitioner's Merit Brief, p. 7).

not entitled to add both credits together so as to be entitled to 544 days (278+266)" pre-sentence county jail credit under 921.161(1), Florida (1983). (Petitioner's Merit Brief, p. 7).

Thus, respondent respectfully submits that the use of R. 3.800(a) to resolve jail credit issues "determinable from records readily available to the court," Thomas, 611 So. 2d 601, is consistent with this "Court's... determination that, as a result of...section [921.161(1)], a sentence is illegal if it fails to allow credit...for all of the time spent in the county jail before sentencing." Martin v. State, 525 So. 2d at 902 (en banc, citing Daniels v. State, 491 So. 2d 543 (Fla. 1986)). Accordingly, respondent's application for jail credit via R. 3.800(a) was properly filed and is plainly concordant with this Court's decisions of July 20th, 1995, in Davis and Callaway. Any other interpretation of Davis and Callaway, clearly misses the mark.

Wherefore, for the foregoing reasons and points of law, this Honorable Court should not disturb the Second District Court of Appeal's decision in Mancino v. State, 22 Fla. L. Weekly D1087 (Fla. 2d DCA April 25th, 1997).

ISSUE TWO:

PRE-SENTENCE JAIL TIME CREDIT PURSUANT TO SECTION 921.161(1), FLORIDA STATUTES, WHICH (1) COMPREHENDS A TOTAL OF 544 DAYS SPENT IN COUNTY JAIL PRIOR TO IMPOSITION OF AN AGGREGATE/ CONTROLLING SENTENCE OF FOUR (4) YEARS (W/THREE-YEAR MANDATORY); AND, (2) RESPRESENTS "ACTUAL" (DESPITE TWO DIFFERENT OFFENSE DATES) PRE-SENTENCE INCARCERATION PERIODS, IS A JUST AND PROPER AWARD DISTINGUISHABLE FROM AN IMPROPERLY SOUGHT AWARD OF "PYRAMIDED" JAIL TIME CREDIT.

This Court, in Daniels v. State, 491 So. 2d 543 (Fla. 1986), held that "when, pursuant to section 921.161(1), a defendant receives pre-sentence jail-time credit on a sentence that is to run concurrently with other sentences, those sentences must also reflect the credit for time served." Id. at 545. (emphasis added). As Judge Cobb noted, writing for the full court in Martin v. State, 525 So. 2d 901 (Fla. App. 5 Dist. 1987):

> Clearly implicit in the Florida Supreme Court's opinion in Daniels[,] is the determination that, as a result of the 1973 legislative amendment of section 921.161(4), Florida Statutes (1973), a sentence is illegal if it fails to allow a defendant credit on all concurrent sentences for all of the time spent in the county jail before sentencing. Consequently, the matter is one which may be raised at any time pursuant to Florida Rule of Criminal Procedure 3.800(a).

Id. at 902. (emphasis added, internal citation omitted).

However, respondent recognizes the fine distinction this Court made in Daniels, "distinguish[ing that case] from one in which the defendant does not receive concurrent sentences on multiple charges: in such a case the defendant is not entitled to have his jail time credit pyramided by being given credit on each sentence for the full time he spends in jail awaiting disposition." Daniels, at 545 (citing Martin v. State, 452 So. 2d 938, 938-939 (quoting Miller v. State, 297 So. 2d 36, 38 (Fla. 1st DCA 1974))). As the First District Court of Appeal, analyzing Harris v. State, 483 So. 2d 111 (Fla. 2d DCA 1986), noted, a defendant is "only entitled to receive credit

for the time actually served in jail prior to trial for the charge being sentenced for...." Whitney v. State, 493 So. 2d 1077, 1078 (Fla. App. 1 1986), citing Harris, at 113. (emphasis in original).

The case at bar is unique,, however, for the following reasons. One, respondent "actually served" 544 days prior to sentence against two (2) of the five (5) concurrent four (4) year sentences, with the sentence on Count 1 of case number 83-04651 (4 years w/3 year mandatory minimum pursuant to F.S. 775.087(2)) being the controlling sentence. Stated another way, four (4) of respondent's five (5) concurrent sentences imposed on February 17th, 1984, are subsumed by the four (4) year (w/3 mandatory) sentence on Count 1 of case number 83-04651.[1] Three, respondent received five (5) four (4) year sentences which begin on the same date and run for the exact length of time (notwithstanding the three-year mandatory). Moreover, on case number 82-07302, respondent's claim doesn't involve "pyramided" time of the type excepted by Daniels and Martin v. State, 452 So. 2d 938, 938-939 (Fla. App. 2 Dist. 1984), but instead deals with the trial court's failure to correctly allow for the full period of incarceration respondent spent in the county jail prior to sentencing. Accordingly, as this Court enunciated in Daniels, "the legislature amended section 921.161(1) to provide that the court must allow a defendant credit for all of the time spent in the county jail before sentencing." Daniels, at 544-45. (emphasis in original). Thus, neglecting to correctly award such jail credit "is illegal" if it fails to comprehend "credit on all concurrent sentences for all the time spent in the county jail before sentencing. Consequently, the matter is one which may be raised at any time pursuant to [Fla. R. Cr. P.] 3.800(a)." Martin v. State, 525 So. 2d

1/ Respondent accrued 278 days in the county jail on 82-07302 representing a period of incarceration in the Old Downtown Clearwater, Florida, jail between 1982 and 1983. Respondent was released ROR on that case but was then re-arrested on case number 83-04651 in early 1983 whereupon his ROR was revoked as to case number 82-07302, and another 266 days accrued on both case numbers 82-07302 and 83-04651 before sentencing on 4/17/84. It should be noted that petitioner recognizes the correct amounts of jail time and the separate offense dates. But absent is reference to the 544 days accrued against 82-07302 before sentencing on February 17th, 1984.

at p. 902. (emphasis added).

Finally, since the proper jail credit award in this matter, 400 days (278+122), would result in the release of the respondent forthwith, he respectfully prays that this Honorable Court take judicial notice of the urgency of this matter and the liberty interests involved. Respondent reiterates that he is only requesting such time as he actually spent in the county jail before sentencing.

Wherefore, based on the foregoing, respondent respectfully requests this Court to issue such relief as it deems proper and necessary to resolve the issues presented herein.

ISSUE THREE:

> WHERE A "SENTENCING ERROR [SUCH AS AN ERROR IN JAIL CREDIT] REQUIRE[S] A DEFENDANT TO BE INCARCERATED OR RESTRAINED FOR A GREATER LENGTH OF TIME IN THE ABSENCE OF [SAID] ERROR, THAT ERROR IS FUNDMENTAL AND ENDURES AND [THE MOVANT] IS ENTITLED RELIEF IN ANY AND EVERY LEGAL MANNER POSSIBLE." HAYES V. STATE, 598 SO. 2D 135 (FLA. APP. 5 DIST. 1992).

The courts of this state have long recognized that pro se motions should be treated "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, at 312, citing 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).

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. On January 21st, 1997, the trial court denied the aforesaid motion by reasoning as follows:

> Defendant's motion makes factual allegation regarding jail time credit. Such motions are properly filed under Rule 3.850. Fla. Stat. 924.051. However, Defendant's motion is untimely because it was filed more than two years after the defendant's judgment and sentence became final.

(See Order attached to respondent's Notice of Appeal to the 2d DCA).

Clearly, the trial court's denial reflects that it never endeavored to treat respondent's motion as if filed under R. 3.850(b). See, e.g., D&antis v. State, 400 so. 2d 525 (Fla. 5th DCA 1981). In the case at bar, respondent's"Motion" and "Memorandum of Law" clearly demostrate that the movant was incarcerated in the State of New Jersey between 1985 and 1996. Moreover, on April 19th, 1996, respondent was before the trial court whereupon his case

history was outlined for an understandably curious judge by the state attorney and respondent's court-appointed counsel (as well as respondent Pro se after he moved the court to represent himself). Respondent's incarceration in New Jersey, he made repeated queries to the Pinellas County Court Clerk seeking to ascertain case numbers, filing rules, etc., in order to properly challenge the jail credit issue as well as imposition of a three-year mandatory pursuant to 775.087(2), Florida Statutes (1981). Respondent stated in those letters that he was indigent and unable to hire a Florida attorney to litigate any issues relevant to his Florida judgment of convictions. Respondent even filed an application under the Interstate Compact Agreement on Detainers to resolve his Florida-matters. (See R. 3.800(a) motion sub judice, p. 6, n.1). Despite these actions on respondent's part, the State of Florida never replied, to any of respondent's entreaties to litigate his claims.

Thus, when a movant can demostrate that the facts, legal rules, or case law upon which the petition is based could not be ascertained, despite the exercise of due diligence, "such motions may be filed outside the two-year time limitation" alluded to in Judge Donahey's denial of respondent's motion sub judice. See, e.g., 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, 1324-26 (Fla. 1994): Branum v. State, 514 So. 2d 422 (Fla. App. 2 Dist. 1987). As the Fifth District Court has reasoned:

> 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 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, 400 So. 2d at 525. (emphasis added).

For the foregoing reasons, respondent respectfully requests this Honorable Court to issue a writ either awarding any jail time credit raised in respondent's original motion as the Court deems necessary and proper, or, instructing the trial court to treat respondent's R. 3.800(a) as if filed as a 3.850(b), within thirty (30) days of this Court's order. See, e.g., Bedford v. State, 633 So. 2d 13 (Fla. 1994); Richardson v. State, 546 So. 2d 1037 (Fla. 1989); Kilgore v. Bird, 149 Fla. 570, 6 So. 2d 541 (1942). See also Article V, § 3(b)(7), Florida Constitution. Thus, an "extraordinary writ" along the lines delineated above 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 the use of such writs." Kilgore v. Bird, supra.

Finally, respondent again respectfully urges this Court to recognize that a proper award of county jail credit in the case at bar would result in the respondent's release. Wherefore, for the foregoing reasons and points of law, respondent prays that this Court issue any writ it deems proper in order to resolve the issues now presented because the interests of justice so demand.

CONCLUSION

Wherefore, based on the foregoing authorities and legal argument, respondent respectfully prays that this Honorable Court uphold the Second District Court of Appeal's ruling in Mancino v. State, 22 Fla. L. Weekly D1037 (Fla. 2d DCA April 25th, 1997), or, in the alternative, issue a writ either granting respondent all county jail time this Court deems proper based on the record before it, or directing the trial court to treat the Rule 3.800(a) motion underlying this appeal as a 3.850(b).

BY: Joseph Sal Mancino

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DATED: July 31st 1997

CERTIFICATE OF SERVICE

The undersigned respondent, pro se, HEREBY CERTIFIES: that a true and correct copy of the foregoing respondent's "Merit Brief" has been forwarded by First Class U.S. Postal Service to Mr. Ron Napolitano, Assistant Attorney General, at 2002 N. Lois Avenue, Suite 700, Tampa, Florida, 33607, on this 3rd day of July, 1997. Too, respondent invokes the "mailbox rule" set forth in Haag v. State, 591 So. 2d 614 (Fla. 1992).

BY: Joseph Sal Mancino
JOSEPH SAL MANCINO, pro se