IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Joseph Sal Mancino,
a/k/a JOSEPH SAL MAKINO
a/k/a PAUL NICOLINO RENO
a/k/a PAUL NICHOLAS CHRIST0
a/k/a PAUL DELUCCA,

Respondent.

Case No. 90,516

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

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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STATEMENT OF THE CASE AND FACTS

On February 17, 1984, Appellee, Joseph Sal Mancino, entered pleas of no contest and was sentenced as follows in the following two cases:

82-07302: Count: Burglary (of a structure, F3) : 4 years FSP
Count 2: Dealing in Stolen Property (F2) :4 years FSP, concurrent with Count 1; credit for 278 time served in county jail prior to sentencing.

83-06651: Count- 1: Armed burglary(1PBL): 4 years FSP with a 3 year minimum mandatory for use of a firearm.
Count 2: Possession of Burglary tools (F3): 4 years FSP concurrent with count 1.
Count 3: Grand Theft (F3) : 4 year FSP concurrent with Count 1; credit for 266 days served in county jail prior to sentencing; all sentences to run concurrent with case 82-07302

(See Exhibit 1 of of trial court's Order Denying Motion For An Order Awarding County Jail Credit.)

Appellee took no direct appeal from his judgment and sentences. In December of 1996 (more than 12 years after appellee's judgement and sentence were entered and became final), he filed a 'Motion For an Order Awarding County Jail Credit Pursuant to Rule 3.800(a)". (See Appellee's motion in record on appeal). Appellee sought credit for time served (a)in the county jails subsequent to the date of his judgment and sentence in both the Pinellas County Jail and the Palm Beach County Jail where he was transferred to answer separate charges; (b)in the Mercer County Detention Center in New Jersey, where the appellee was held on a Florida capias after his parole from imprisonment in that state (Appellee escaped

from custody while in transit from Palm Beach county to the Florida state prison in 1984 was apparently arrested in New Jersey in 1985 for offenses in that state); and (c) for proper credit for both 278 days and 266 days for time spent in county jail for prior to sentencing for allegedly separate arrests and separate times in cases 82-07303 and 83-04651. (See appellee's motion and attached exhibits in record on appeal).

The trial court, without holding an evidentiary hearing and based upon the court's consideration of the motion and the court file and records, entered an "Order Denying Motion For An Order Awarding County Jail Credit* on January 21, 1997. The trial court made the following findings:

> 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. (Exhibit 1). (citation omitted)

(See trial court's order in record on appeal)

Appellee filed a timely notice of appeal (See Notice of Appeal in record on appeal). The Second District Court of Appeals in Mancino v. State, 22 Fla. L. Weekly D1087 (Fla. 2d DCA April 25, 1997), reversed and remanded the case to the trial court to consider the merits of appellee's claim for relief. The district court of appeal relied upon the case of Swycl v. State, 22 Fla. L. Weekly D797 (Fla. 2d DCA March 26, 1997) ***appeal pending*** State v.

Swyck No, 90,358, and held that, "We have consistently held that rule 3.800 is a proper vehicle for raising a credit time issue where jail credit can be determined from the court records." *Id.* The district court certified conflict with perry v. State, 684 So.2d 239 (Fla. 1st DCA 1996); Sullivan v. State, 674 So. 2d 214 (Fla. 4th DCA 1996); and Chaney v. State, 678 So. 2d 880 (Fla. 5th DCA 1996). *Id.* at D1038. The State of Florida filed a timely notice of Appeal.

SUMMARY OF THE ARGUMENT

This court should resolve the conflict of opinions by upholding the decisions of the First, Fourth, and Fifth District Courts of Appeal which have held 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. Pro. 3.800(a) unless the defendant alleges that the **denial** of such credit will result in him serving **a** sentence which exceeds the statutory maximum for the offense.

ARGUMENT

ISSUE I

DOES THE DEFINITION OF AN "ILLEGAL SENTENCE" IN DAVIS V. STATE, 661 SO. 2D 1193, 1196 (FLA. 1995) AND CALLAWAY V. STATE 658 SO. 2D 983, 988 (FLA. 1995) APPLY TO MOTIONS FILED UNDER RULE 3.800 REQUESTING CREDIT FOR JAIL TIME PREVIOUSLY SERVED SO THAT SUCH MOTIONS MAY NOT BE RAISED WHERE THE SENTENCE WOULD NOT EXCEED THE MAXIMUM SENTENCE ALLOWED BY LAW?.

The First district Court of Appeals in Berry v. State, 684 So. 2d 239 (Fla. 1st DCA 1996), The Fourth District Court of Appeals in Sullivan v. State, 674 So. 2d 214 (Fla. 4th DCA 1996) and the Fifth District Court of Appeals in Chaney v. State, 678 So. 2d 880 (Fla. 5th DCA 1996) have ruled that the failure of the trial court to award proper credit for time served in jail cannot be raised in a motion filed pursuant to Fla. R. Cram. Pro. 3.800(a) **unless the defendant alleges that the denial of such credit causes him to be sentenced to period in excess** of **the statutory maximum for his offense.** These appellate courts have relied upon this Court's statements in Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995), ("..an illegal sentence is one that exceeds the maximum period set, forth by law for a particular offense without regard to the guide-lines.") and State v. Callaway, 658 So. 2d 983 (Fla. 1995) ("We recently explained that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." in reaching their legal conclusion.

The Second District Court of Appeals in the instant case, as well as in Swyck v. State, 22 Fla. L. Weekly D 797 (Fla. 2d DCA March 26, 1997), *rev. pending* State v. Swyck, No. 90,358, and the Third District in Gonzalez v. State, 678 So. 2d 433 (Fla. 3d DCA 1996), have ruled that such requests for credit for time served can be made under rule 3.800(a). Contrary to the reasoning of the First, Fourth and Fifth Districts, the Second and Third District have held that such relief pursuant to rule 3.800(a) would be available even if the failure to give such credit does not result in the defendant being sentenced to a period in excess of the statutory maximum for the offense.

Petitioner submits that this Court should resolve this conflict in favor of the legal analysis as set forth by the First, Fourth, and Fifth District Courts of Appeal.

Respondent was convicted in 1984 in case 82-07302 for the offenses of Burglary (a third degree felony - maximum punishment 5 years) and Dealing in Stolen Property (a second degree felony - maximum punishment 15 years) and in case 83-04651 of the offenses of Armed Burglary (a first degree felony punishable by life), Possession of burglary Tools (a third degree felony - maximum punishment 5 years) and grand theft (a third degree felony - maximum penalty grand theft). Respondent received a sentence of 4 years imprisonment on each charge to run concurrently). Respondent has received credit for the 266 to which the trial court stated that he

was entitled to in its sentencing documents in case 83- 04651. Respondents acknowledges this fact in his motion for additional credit (See Motion For an Order Awarding County Jail Credit Pursuant to Rule 3.800(a) at p. 7 in record on appeal). Since all of the sentences are for the same period of time (4 years) the longest sentence respondent must serve is the 4 year sentence for armed burglary which contains the 3 year minimum mandatory sentence (to which no statutory gain time applies). This is the sentence to which the Department of Corrections looked to determine respondent's release date. As respondent, himself, states his tentative release date is with credit for time served of 266 days and statutory gain time applied to the remaining year is February 19, 1999 (See respondent's motion at p. 7 and respondents exhibit 13).

Respondent is not entitled to credit 278 spent in county jail awarded in case 82-07302 toward his sentence in case 83-04651 in addition to the 266 days he received in that case (83-04651). Respondent, himself, admits that the 278 days and the 266 days he served in the county jail prior to sentencing were separate and distinct periods of incarceration for each case, (See respondent's motion at p. 4). Respondent is not entitled to add both credits together so as to be entitled to 544 days (278 + 266) in both cases. Davenport v. State, 664 So. 2d 323 (Fla. St. DCA 1995, rev. den. 665 So. 2d 120, distinguishing Daniels v. State, 491 So. 2d 543 (Fla. 1986).

Assuming without conceding, that respondent is entitled to credit for post-sentence county jail credit of 61 days in Florida and 61 days credit for time spent in the Mercer County jail of the Florida capias for a total of 122 days, the failure to give such credit will not result in the respondent serving a sentence greater than the statutory maximum of life imprisonment (armed burglary), or for 15 years (dealing in stolen property) or for 5 years (possession of burglary tools and grand theft).[1]

As this Court reasoned in Callaway, *supra.* at 987-988:

> In *Judge v. State, 596 So.* 2d 73 (Fla. 2d DCA 1991) review denied, 613 So. 2d 5 (Fla. 1992), the court recognized that there are three 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;and (3) an "illegal sentence" in which the error must be corrected as a matter of law in a rule 3.800 proceeding. *Id.* at 76, 77 & n. 1. We explained recently that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. *Davis v. State...*

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[1]The undersigned has been informed by the Department of Corrections that the respondent was given credit for 278 days county jail time for the offenses in case 82-07302 and has, in fact, completed service of his 4 year sentences in that case as of June 8, 1997. The Department further advises that respondent received 266 days county jail credit for all offenses in case 83-04651 and that with accrued statutory gain time respondent has a tentative release date of June 19, 1998 (he can still earn additional statutory gain time) on the 4 year sentence with the three year minimum mandatory (armed burglary) and will complete his other 4 year sentences (without minuum mandatory - possession of burglary tools and grand theft) on June 20, 1997.

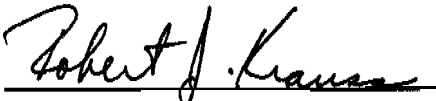
Petitioner submits that although the respondent may entitled to credit for time served in Florida county jails after sentencing (Pinellas and Palm Beach County) and in Mercer County, New Jersey (on the Florida capias), the proper legal procedure was to either raise the issue in a post-conviction action under rule 3.850 (which respondent could not do because the 2 year period of limitation had run) or as the Fourth District not in Sullivan v. Stat-e, 674 So. 2d at 215 n.1, 'if the defendant is beyond the time period for Rule 3.850 relief and the sentence has been served but for the improper jail time credit, a petition for writ of habeas corpus would offer relief.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellee respectfully requests that Appellant's convictions and sentences be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Joseph Sal Mancino, DOC No. 165264, Apalachee Correctional Institution, Sneads, Florida 32460, this 16th day of June, 1997.

Ronald Napolitano

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