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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Paul Timothy Newell
Petitioner

v s . . ,

Case No. : 91,135

State of Florida
Respondent

**ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE NINTH' JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

PETITIONER'S REPLY BRIEF ON MERITS

Paul T. Newell
Pro Se

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*The case evolved in the correct manner and this Court should allow **Supplementation** of the Record on Review to resolve the issues presented, in light of Judicial Efficiency.*

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SUMMARY OF ARGUMENT

The Respondent acknowledges the sentencing error; but, argues that the Record needs to be completed in order to properly resolve the issues presented and to, confirm the argument presented by the Petitioner.

ARGUMENT

The correct Procedure was used and this Court should award the Petitioner the opportunity to supplement the Record on review in light of Judicial Efficiency,

In reviewing a Decision by a lower court, this Court has the Authority and Jurisdiction to require transmittal of necessary Documentation, including but not limited to the original Sentencing transcripts, *according to the Florida Constitution, Article V, § 3 (b) (3), and Rule 9.030 (a)(2)(a)(IV) of the Florida Rules of Appellate Procedure.*

The State's argument is based solely upon the allegation that the Petitioner did not follow the appropriate avenues to seek relief and that the Record, is not complete to resolve such issues. The procedures used in the instant case are identical to those of *Moody Vs. State*, 699 So.2d 1009 (Fla. 1997), which was through a 3.850 Motion.

Florida Rules of Criminal Procedure was adopted in 1963 by the Florida Supreme Court to provide a omnibus collateral attack remedy in criminal cases, in lieu of the Habeas Corpus and Coram Nobis writs, *[See State VS. Gomez, 363 So.2d 624 (Fl. 3rd DCA, 1978)]*

When a defendant's sentence was improperly enhanced in contravention of the provisions of the Habitual Offender Act, a Motion pursuant to rule 3.850 is the appropriate method for seeking release. *[See Smith Vs. State, 378 So.2d 313 (Fl. 5th DCA, 1980)]*

A State prisoner contending that his sentence was improper has remedy by way of 3.850 rather than by way of civil action. *[See Bailey Vs. Askew, 486 F.2d 134 (CA 5, Fla. 1973)]*

This Court has exercised its Jurisdiction, pursuant to Article V, § 3 (b)(3) of the Florida Constitution (1980) and Fla.R.App.P. 9.030 (a)(2)(A)(IV); and on October 20, 1997, ordered the 5th District Court of Appeal to file the "Original Record" on or before December 19, 1997, in which the Clerk of the 5th District sent a Certificate regarding transmittal of the Trial court record.

Here the State's argument is refuted and the Petitioner solemnly requests that this Court order or allow Petitioner to file for the Sentencing Transcriptions and Documents, as well, as the Judgment of Sentence and Appellate Briefs; while preserving Judicial Efficiency to resolve the issues presented in this case. [Please see Fla.R.App.P. 9.200 (f)(2), which states: "***If the Court finds the record is incomplete it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined because of an incomplete record until an opportunity to supplement the record has been given.***"]

To further clarify the issue, during the Sentencing hearing, the trial court orally pronounced initially a five-year sentence as a Violent Habitual Offender and stated:

THE COURT: "I am going to sentence the Defendant as a Violent Habitual Felony Offender. I'll sentence him to Five years". (Trial Transcripts, pg. 79, line 5-9)

At that time, the State misled the trial court with the following statement:

THE STATE: "...I would not think you could sentence him to less than ten, if you are going to sentence him as a Violent Habitual". (Trial Transcripts, pg. 79, line 15-18)

Following Defense Counsel's objection, the court confirmed the misguidance by stating:


THE ; COURT : "...I cannot sentence him to Five-years as a Violent Habitual **Felony** Offender under my understanding of the law:"

At that time the trial court withdrew the Five-year sentence and sentenced the Defendant to 10 years as a Violent Habitual Felony Offender. **However**, no minimum mandatory portion of the Habitual Statute was ever orally imposed; the subsequent Judgment of Sentence reflected a 10-year Minimum Mandatory.

CONCLUSION

Based upon the foregoing Argument and Authority, the Petitioner respectfully, requests this Honorable Court to allow Supplementation of the Record on Review and make a Conclusion based upon a Complete Record, in accord with **Rule 9.200 (f)(2)** of the Florida Rules of Appellate Procedure.

Respectfully Submitted,


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