IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TIMOTHY SCHEBEL,

Respondent.

CASE NO. 92,469

# PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

TRINA KRAMER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0064040

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3602

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS . . . . . i

TABLE OF CITATIONS . . . . . ii

PRELIMINARY STATEMENT . . . . . 1

STATEMENT OF THE CASE AND FACTS . . . . . 1

SUMMARY OF ARGUMENT . . . . . 3

ARGUMENT . . . . . 4

ISSUE I

WHETHER CONSECUTIVE SENTENCES EXCEEDING SIX YEARS IMPOSED UPON A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER UNDER CHAPTER 958, FLORIDA STATUTES (1989), EITHER INITIALLY OR UPON REVOCATION OF PROBATION OR COMMUNITY CONTROL, CONSTITUTE "ILLEGAL" SENTENCES WITHIN THE MEANING OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a), AS THAT TERM HAS BEEN DEFINED IN DAVIS V. STATE, 661 So.2d 1193, 1196 (FLA. 1995); STATE v. CALLAWAY, 658 So.2d 983 (FLA. 1995); AND KING v. STATE, 681 So.2d 1136 (FLA. 1996)?

ISSUE II

WHETHER A CLAIM THAT A DEFENDANT, WHO HAS BEEN SENTENCED AS A YOUTHFUL OFFENDER, HAS NOT BEEN AFFORDED THE CORRECT AMOUNT OF CREDIT FOR TIME PREVIOUSLY SERVED IN JAIL OR PRISON OR GAIN TIME EARNED FROM PREVIOUS INCARCERATIONS, WITH THE RESULT THAT HIS OR HER SENTENCE EXCEEDS THE STATUTORY MAXIMUM FOR YOUTHFUL OFFENDERS, MAY BE CONSIDERED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a) IN LIGHT OF THE DEFINITION OF "ILLEGAL" SENTENCE SET OUT IN DAVIS V. STATE, 661 So.2d 1193, 1196 (FLA. 1995); STATE v. CALLAWAY, 658 So.2d 983 (FLA. 1995); AND KING v. STATE, 681 So.2d 1136 (FLA. 1996), AND THE AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b) AND SECTION 924.051, FLORIDA STATUTES (1995)?

CONCLUSION . . . . . 11

CERTIFICATE OF SERVICE . . . . . 11

APPENDIX

## TABLE OF CITATIONS


| CASES | PAGE(S) |
|---|---|
| Arnette v. State, 604 So. 2d 482 (Fla. 1992) | 6 |
| Campbell v. State, 696 So. 2d 953 (Fla. 4th DCA 1997) | 9 |
| Carter v. State, 688 So. 2d 976 (Fla. 1st DCA 1997) | 9 |
| Davis v. State, 661 So. 2d 1193 (Fla. 1995) | 2,4,7,8 |
| Fountain v. State, 660 So. 2d 376 (Fla. 4th DCA 1995) | 10 |
| Gardner v. State, 656 So. 2d 933 (Fla. 1st DCA 1995) | 6 |
| Holland v. State, 672 So. 2d 566 (Fla. 5th DCA 1996) | 9 |
| Johnson v. State, 678 So. 2d 934 (Fla. 3rd DCA 1996) | 6 |
| King v. State, 681 So. 2d 1136 (Fla. 1996) | 2,4,8 |
| Krawic v. State, 666 So. 2d 599 (Fla. 4th DCA 1996) | 10 |
| Reeves v. State, 605 So. 2d 562 (Fla. 2d DCA 1992) | 6 |
| State v. Callaway, 658 So. 2d 983 (Fla. 1995) | 2,4,8 |
| Sanchez v. State, 683 So. 2d 606 (Fla. 3d DCA 1996) | 9 |
| Schebel v. State, 23 Fla.L.Weekly D556 (February 17, 1998) | 2 |

FLORIDA STATUTES

| | |
|---|---|
| § 958.04, Fla. Stat. (1989) | 6 |
| § 958.14, Fla. Stat. (1989) | 6 |
| § 958.14, Fla. Stat. (1990 Supp.) | 6 |

OTHER

| | |
|---|---|
| Ch. 90-208, § 19, Laws of Florida | 6 |

## PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as the State. Respondent, Timothy Schebel, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name. The symbol "R" will refer to the record on appeal and will be followed by the appropriate page number in parentheses.

## STATEMENT OF THE CASE AND FACTS

According to the facts contained in Respondent's motion for post-conviction relief, Respondent entered into a stipulated plea agreement and was sentenced as a juvenile under the Florida Youthful Offender Act on May 21, 1990 to four years in prison followed by three years probation. (R. 2). The trial court revoked Respondent's probation for new substantive offenses committed in 1991 and resentenced Respondent to seven and a half years in prison. In August 1995, the trial court again revoked Respondent's probation for new substantive offense and sentenced Respondent to seven years.

Respondent filed a motion for post-conviction relief which argued that his sentence was illegal under the Youthful Offender Act. (R. 1-17). The State filed a response to the motion which claimed that the trial court was not limited to resentencing Respondent within the six year limit after the Respondent committed

new violations of law which resulted in Respondent violating his probation. (R. 20-22). The trial court's order denying Respondent's motion for post-conviction states:

> THIS MATTER is before the Court on Defendant's Motion for Post Conviction Relief and after reviewing said Motion and the State's Response to the Motion, it is thereupon:
>
> ORDERED that Defendant's Motion for Post Conviction Relief be, and the same is, hereby denied.

(R. 23).

On appeal, the District Court reversed the trial court's order summarily denying the Respondent's post-conviction motion. The Court also certified the following as two questions of great public importance:

> WHETHER CONSECUTIVE SENTENCES EXCEEDING SIX YEARS IMPOSED UPON A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER UNDER CHAPTER 958, FLORIDA STATUTES (1989), EITHER INITIALLY OR UPON REVOCATION OF PROBATION OR COMMUNITY CONTROL, CONSTITUTE "ILLEGAL" SENTENCES WITHIN THE MEANING OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a), AS THAT TERM HAS BEEN DEFINED IN DAVIS V. STATE, 661 So.2d 1193, 1196 (FLA. 1995); STATE v. CALLAWAY, 658 So.2d 983 (FLA. 1995); AND KING v. STATE, 681 So.2d 1136 (FLA. 1996)?
>
> WHETHER A CLAIM THAT A DEFENDANT, WHO HAS BEEN SENTENCED AS A YOUTHFUL OFFENDER, HAS NOT BEEN AFFORDED THE CORRECT AMOUNT OF CREDIT FOR TIME PREVIOUSLY SERVED IN JAIL OR PRISON OR GAIN TIME EARNED FROM PREVIOUS INCARCERATIONS, WITH THE RESULT THAT HIS OR HER SENTENCE EXCEEDS THE STATUTORY MAXIMUM FOR YOUTHFUL OFFENDERS, MAY BE CONSIDERED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a) IN LIGHT OF THE DEFINITION OF "ILLEGAL" SENTENCE SET OUT IN DAVIS V. STATE, 661 So.2d 1193, 1196 (FLA. 1995); STATE v. CALLAWAY, 658 So.2d 983 (FLA. 1995); AND KING v. STATE, 681 So.2d 1136 (FLA. 1996), AND THE AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b) AND SECTION 924.051, FLORIDA STATUTES (1995)?

Schebel v. State, 23 Fla.L.Weekly D556 (February 17, 1998).

## SUMMARY OF ARGUMENT

ISSUE I.

The State acknowledges that a Youthful Offender sentence imposed upon resentencing for a crime committed before the amendments to the Youthful Offender statute which is in excess of six years, constitutes an "illegal" sentence for purposes of Florida Rule of Criminal Procedure 3.800(a). The district court so held and the state has no desire to seek review because the statute was amended in 1990 to permit sentences beyond six years on a substantive violation of probation.

ISSUE II.

The issue of whether a defendant has received the proper amount of credit for time served is not apparent from the face of the record and therefore cannot be the subject of a rule 3.800(a) motion.

## ARGUMENT

### ISSUE I

WHETHER CONSECUTIVE SENTENCES EXCEEDING SIX YEARS IMPOSED UPON A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER UNDER CHAPTER 958, FLORIDA STATUTES (1989), EITHER INITIALLY OR UPON REVOCATION OF PROBATION OR COMMUNITY CONTROL, CONSTITUTE "ILLEGAL" SENTENCES WITHIN THE MEANING OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a), AS THAT TERM HAS BEEN DEFINED IN DAVIS V. STATE, 661 So.2d 1193, 1196 (FLA. 1995); STATE v. CALLAWAY, 658 So.2d 983 (FLA. 1995); AND KING v. STATE, 681 So.2d 1136 (FLA. 1996)?

In his motion for post-conviction relief, Respondent claimed that the circuit court erred in denying his motion for post-conviction relief which alleged that his seven year sentence was illegal under the Youthful Offender Act. Before 1990, a trial court who was resentencing a defendant after a substantive violation of probation, who had originally been sentenced as a Youthful Offender, could only impose a sentence up to six years. According to the Youthful Offender statute in effect when the Respondent committed his original crimes:

> A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s. 948.06(1). However, no youthful offender shall be committed to the custody of the department for such violations for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he was found guilty, whichever is less, with credit for time served while incarcerated.

§ 958.14, Fla. Stat. (1989); See also, 958.04, Fla. Stat. (1989).

According to the First District:

> [A] youthful offender who is resentenced after a violation of probation or community control can be resentenced to a term of incarceration no longer than six

> years or for a period not exceeding the statutory maximum for the offense, whichever is less, with credit for time served while incarcerated. Moreover, once a defendant is sentenced under the provisions of section 958.04, a court may not reclassify the defendant and sentence him or her in a manner inconsistent with section 958.04.

Gardner v. State, 656 So.2d 933, 937 (Fla. 1st DCA 1995)(citations omitted); See also, Arnette v. State, 604 So. 2d 482 (Fla. 1992).

In 1990, the Youthful Offender statute was amended to allow a trial court to resentence a defendant to longer than six years for a substantive violation of probation. § 958.14, Fla. Stat. (1990 Supp.); Johnson v. State, 678 So.2d 934 (Fla. 3rd DCA 1996). This amendment took effect on October 1, 1990. Ch. 90-208, § 19, Laws of Fla. The Respondent committed his original offenses before these amendments took effect and is therefore still subject to the pre-1990 Youthful Offender Act upon resentencing on a violation of probation. Reeves v. State, 605 So.2d 562, 563 (Fla. 2d DCA 1992)(holding that "[s]ince defendant was being sentenced for a crime he committed in 1988, we conclude that application of a statute amended in 1990 which clearly serves to increase the length of incarceration to which he could be subject would constitute an impermissible ex post facto law under both the Florida and United States Constitution.").

In the instant case, the First District held that the imposition of a sentence in excess of six years under the Youthful Offender Act constitutes an illegal sentence. The State acknowledges that the six year statutory limit imposed on the sentencing of a Youthful Offender is the equivalent of a statutory maximum. In Davis v. State, 661 So.2d 1193 (Fla. 1995), this court defined an

illegal sentence as "one that exceeds the maximum period set forth by law for a particular offense". Thus, a Youthful Offender re-sentenced on a crime committed before the amendments to the Youthful Offender statute to a sentence in excess of the six year statutory limit has received an "illegal" sentence. The State points out that it conceded the legal point and that the legal point has no continuing significance because the statute was amended to permit longer sentences in 1990 and this case has no continuing relevance.

## ISSUE II

WHETHER A CLAIM THAT A DEFENDANT, WHO HAS BEEN SENTENCED AS A YOUTHFUL OFFENDER, HAS NOT BEEN AFFORDED THE CORRECT AMOUNT OF CREDIT FOR TIME PREVIOUSLY SERVED IN JAIL OR PRISON OR GAIN TIME EARNED FROM PREVIOUS INCARCERATIONS, WITH THE RESULT THAT HIS OR HER SENTENCE EXCEEDS THE STATUTORY MAXIMUM FOR YOUTHFUL OFFENDERS, MAY BE CONSIDERED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a) IN LIGHT OF THE DEFINITION OF "ILLEGAL" SENTENCE SET OUT IN DAVIS V. STATE, 661 So.2d 1193, 1196 (FLA. 1995); STATE v. CALLAWAY, 658 So.2d 983 (FLA. 1995); AND KING v. STATE, 681 So.2d 1136 (FLA. 1996), AND THE AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b) AND SECTION 924.051, FLORIDA STATUTES (1995)?

In his motion for post-conviction relief, Respondent also claimed that his sentence was illegal because when he was resentenced after his probation was revoked, he was not given credit for time he previously had served and that, as a result, the sentence he received was in excess of the six year maximum Youthful Offender sentence. However, Respondent's claim is not cognizable by way of a rule 3.800(a) motion.

According to Florida Rule of Criminal Procedure 3.800(a), "[a] court may at any time correct an illegal sentence imposed by it...". The subject matter of a rule 3.800 motion "is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination". State v. Callaway, 658 So. 2d 983 (Fla. 1995). In Callaway, this Court ruled on whether an

alleged Hale[1] sentencing error could be raised under rule 3.800. This Court noted:

> A rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed, and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination.

This Court then held that the question of whether a Hale sentencing error has occurred would require a determination of whether the offenses for which the defendant was sentenced arose out of a single criminal episode. Because the issue was not a "pure question of law" and "often could not be determined from the face of the record", this Court ruled that an alleged Hale error did not constitute an "illegal" sentence that could be raised by way of a rule 3.800 motion. Id. at 988. See also, Campbell v. State, 696 So.2d 953 (Fla. 4th DCA 1997)(holding that relief under rule 3.800 was unavailable because the resolution of defendant's motion to correct an illegal sentence required a factual inquiry as to whether prior convictions on the guidelines scoresheet were uncounselled and was not ascertainable from the face of the record); Holland v. State, 672 So.2d 566, 567 (Fla. 5th DCA 1996)(holding that issue of whether state failed to establish actual physical injury so as to justify the scoring of victim injury points was not cognizable in a rule 3.800(a) proceeding because "any alleged error is not readily ascertainable from the

---

[1]Hale v. State, 630 So.2d 521 (Fla. 1993)(holding that trial court not statutorily authorized to impose consecutive habitual offender sentences for multiple offenses arising out of the same criminal episode).

face of the record"); Carter v. State, 688 So.2d 976 (Fla. 1st DCA 1997)(holding that defendant's rule 3.800(a) motion claiming that he should not have been assessed points on sentencing scoresheet for victim's physical injury because intercourse did not cause physical injury was properly denied since "resolution of that fact-based claim would require an evidentiary hearing."); Sanchez v. State, 683 So.2d 606 (Fla. 3d DCA 1996)(holding that defendant's claim that his plea was not entered voluntarily as he did not understand the number of counts to which he was pleading or the length of his sentence were issues that could not be resolved without an evidentiary hearing and therefore could not be brought by way of a rule 3.800 motion).

The issue of whether a defendant has received the proper amount of credit for time served is not usually apparent from the face of the record and certainly was not so here. Resolution of that type of claim requires a evidentiary determination and therefore cannot be the subject of a rule 3.800(a) motion. Krawic v. State, 666 So.2d 599 (Fla. 4th DCA 1996)(holding that a rule 3.800 motion "does not contemplate resolution of a factual dispute, and any error must appear from the face of the record."). Thus, this Court should hold that a claim that a defendant was not given credit for time served is not cognizable by way of a rule 3.800(a) motion and answer the second certified question in the negative.

## CONCLUSION

Based on the foregoing, the State respectfully submits the first question certified by the First District Court of Appeals should be answered in the affirmative and the second certified question should be answered in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

TRINA KRAMER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0064040
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3602

COUNSEL FOR PETITIONER
[AGO# L98-1-2831]

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Timothy Schebel, #119994/B-73, Baker Correctional Institution, P.O Box 500/B1-1206, Sanderson, FL, 32087-0500, this 30th day of March, 1998.

Trina Kramer
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\98102831\SCHEBEBI.WPD --- 3/27/98,2:05 pm]