

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

APR 14 1998

CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

TIMOTHY SCHEBEL,
Respondent,

Vs.

Case No. 92,469

STATE OF FLORIDA,
Petitioner.

original copy

RESPONDENT'S REPLY BRIEF ON THE MERITS

Timothy Schebel, pro se
Baker Correctional Institution
Post Office Box 500
Sanderson, Florida 32087-0500

TABLE OF CONTENTS

<u>TOPIC</u>	<u>PAGE</u>
Table of Contents.....	i
Table of Citations.....	ii
Preliminary Statement.....	iii
Statement of the Case and Facts.....	1
Summary of Argument.....	2
Argument.....	3-4
Conclusion.....	5
Certificate of Service.....	5

TABLE OF CITATIONS

<u>CITATION</u>	<u>PAGE</u>
<u>Davis v. State</u> , 661 So.2d 1193, 1196 (Fla. 1995).....	3,4
<u>Desantis v. State</u> , 400 So.2d 525 (Fla. 5th DCA 1981).....	3
<u>Hall v. State</u> , 643 So.2d 635 (Fla. 1st DCA 1994).....	3
<u>State v. Callaway</u> , 658 So.2d 983 (Fla. 1995).....	4
<u>State v. Green</u> , 547 So.2d 925 (Fla. 1989).....	4
<u>Young v. State</u> , 619 So.2d 378 (Fla. 2nd DCA 1993).....	3

OTHER AUTHORITIES

Florida Rules of Criminal Procedure:

Rule 3.850.....	4
Rule 3.800(a).....	2,3,4
Rule 3.800(b).....	3

Florida Statutes:

Section 924.051 (1995).....	3
Section 944.291 (1987).....	4

PRELIMINARY STATEMENT

Respondent, Timothy Schebel, Appellant in the First District Court of Appeal and Defendant in the trial court, will be referred to as the Respondent. The State of Florida, the Petitioner in this cause, the Appellee in the First District Court of Appeal, and the prosecuting authority in the trial court, will be referred to as the State in this brief.

STATEMENT OF THE CASE AND FACTS

The Respondent concedes as to the statement of case and facts in Petitioner's brief as an accurate reflection of Respondent's case.

SUMMARY OF ARGUMENT

ISSUE I:

The State has conceded Issue I is cognizable in a Rule 3.800(a) motion, Florida Rules of Criminal Procedure. Therefore, Issue I is moot.

ISSUE II:

Any sentence that exceeds the statutory maximum by law would be cognizable in a Rule 3.800(a) motion. An "illegal sentence" which can be corrected at "any time," is one that exceeds the maximum period set forth by law for a particular offense without regard to the sentencing guidelines. It would take the trial court a minimal amount of time to determine the previous incarceration a defendant has served. Therefore, no evidentiary hearing would be required.

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, prison or gain-time which was earned from previous incarcerations, resulting in his or hers sentence exceeding the statutory maximum for youthful offenders, may be considered under Florida Rules of Criminal Procedure, Rule 3.800(a) in light of the definition of an "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 Rules of Criminal Procedure, Rule 3.800(a), and § 924.051, Florida Statutes (1995).

In Respondent's motion for post-conviction relief, styled under Florida Rules of Criminal Procedure, Rule 3.850, Respondent claimed that upon resentencing for probation violations, the trial court failed to apply the appropriate credit for time previously served and gain-time earned on his prior incarceration.

In footnote 2 of the district court's opinion, the court stated they have the authority to treat prisoner petitions as if the proper remedy had been sought, thereby construing Respondent's 3.850 motion as a 3.800(a) motion. Hall v. State, 643 So.2d 635 (Fla. 1st DCA 1994) (on reh'g); Young v. State, 619 So.2d 378 (Fla. 2nd DCA 1993); Desantis v. State, 400 So.2d 525 (Fla. 5th DCA 1981).

If in fact this Court answers the certified question in the negative, Respondent's claim that the trial court failed to apply the appropriate credit for time served and gain-time earned on his prior incarceration which was brought by way of a 3.850 motion, if indeed a evidentiary hearing is required.

In the instant case, Respondent was originally sentenced to four (4) years imprisonment and three (3) years probation. Respondent completed the four (4) year term of imprisonment. Respondent was placed in a Boot Camp and successfully completed when an order was entered modifying his sentences to five (5) years probation. Florida Statutes § 944.291 (1987) states a prisoner who is released early because of gain-time is considered to have completed his sentence in full. State v. Green, 547 So.2d 925 (Fla. 1989).


Any sentence that exceeds the statutory maximum is cognizable on a Rule 3.800(a) motion. In fact, after this Court's decision in Davis v. State, 661 So.2d 1193, 1196 (Fla. 1995), the district court will only view a case if a petitioner claims his or her sentence exceeds the statutory maximum.

A trial court upon reviewing a defendant's 3.800(a) motion, could, in the alternative, contact the Florida Department of Corrections and receive the correct information on what type of sentence a defendant had completed, or check the court's previous order ordering the defendant incarcerated. Therefore, a evidentiary hearing would not be required and a motion, pursuant to Rule 3.800(a) would be a valid vehicle to pursue.

CONCLUSION

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

Respectfully submitted,



Timothy Schebel, pro se
Baker Correctional Institution
Post Office Box 500
Sanderson, Florida 32087-0500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Reply Brief On The Merits, has been furnished to: Trina Kramer, ✓ Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 by U.S. Mail this 13 day of April, 1998.



Timothy Schebel