IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,649

JESUS BOVER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Petitioner, Jesus Bover, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the attached appendix will be designated by "App." followed by the appropriate letter and a colon to indicate the appropriate page number.

CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF THE CASE AND FACTS

The Defendant was charged with eight counts of grand theft and seven counts of uttering a forged instrument for crimes he committed in the period between June 21 and September 17, 1993. (R. 67). The State and the Defendant entered into a plea bargain whereby the Defendant would plead no contest as a habitual offender in exchange for ten-year concurrent sentences on all counts. The Defendant was sentenced accordingly in 1994. (R. 68).

On May 15, 1998, the Defendant filed a motion to correct illegal sentence pursuant to Rule 3.800(a), Fla. R. Crim. P., asserting that all of the predicate offenses used to adjudicate him as a habitual offender had been imposed on June 30, 1992, and thus did not satisfy the sequential conviction rule. (R. 4-7, 68-69). On June 2, 1998, the circuit court denied the Defendant's motion as insufficient. (R. 2). The Defendant appealed to the District Court of Appeal, Third District. (R. 1). The Third District ordered the State to respond to the Defendant's motion. (R. 8). After the State's Response and the Defendant's Reply, the Third District appointed the Public Defender to represent the Defendant, set oral argument and invited the parties to file additional memoranda. (R. 9-17, 18-23, 51-52).

The Third District Court of Appeal affirmed the order denying the Defendant's Motion to Correct Illegal Sentence and certified conflict with *Judge v. State,* 596 So. 2d 73 (Fla. 2d DCA 1991)(en banc); *Freshman v. State,* 730 So. 2d 351 (Fla. 4th DCA 1999); *Bell v. State,* 693 So. 2d 700 (Fla. 2d DCA 1997) and *Botelho v. State,* 691 So. 2d 648 (Fla. 2d DCA 1997).

This petition follows.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT PROPERLY HELD THAT A DEFENDANT MAY NOT CHALLENGE HIS STATUS AS A HABITUAL OFFENDER IN A MOTION PURSUANT TO RULE 3.800(a), FLA. R. CRIM. P. WHERE THE ACTUAL CHALLENGE IS TO THE ADJUDICATION AS A HABITUAL OFFENDER AND NOT THE IMPOSITION OF THE SENTENCE?

SUMMARY OF THE ARGUMENT

The District Court properly affirmed the denial of the Defendant's motion to correct an illegal sentence where a motion pursuant to Rule 3.800(a), Fla. R. Crim. P., is not the proper vehicle to challenge a habitual offender sentence when the Defendant's real target of his challenge is the adjudication as a habitual offender and not the imposition of the sentence.

Habitualization is a two-step process. In the first step, the defendant is adjudicated to be a habitual offender. Once that is done, the trial court knows what the permissible legal maximum may be. In the second step, the court imposes sentence.

The Defendant cannot now challenge the adjudication as a habitual offender in a motion pursuant to Rule 3.800(a). The trial court entered a sentence in reliance on §775.084, Fla. Stat. (1993), and made the specific findings which the statute mandatorily required as a prerequisite to the sentence. The Defendant had his opportunity to challenge that adjudication either during the proceeding or on direct appeal or by filing a timely motion pursuant to Rule 3.850, Fla. R. Crim. P. Since the Defendant is challenging the adjudication and not the "sentence," a motion pursuant to Rule 3.800(a) is not the proper vehicle.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT A DEFENDANT MAY NOT CHALLENGE HIS STATUS AS A HABITUAL OFFENDER IN A MOTION PURSUANT TO RULE 3.800(a), FLA. R. CRIM. P. WHERE THE ACTUAL CHALLENGE IS TO THE ADJUDICATION AS A HABITUAL OFFENDER AND NOT THE IMPOSITION OF THE SENTENCE.

The Defendant asserts that he may challenge the validity of the predicate offenses used to habitualize him in a motion pursuant to Rule 3.800(a), Fla. R. Crim. P. The Defendant claims that the predicate offenses did not satisfy the sequential conviction rule. However, the State submits that the District Court of Appeal, Third District, properly held that a motion pursuant to Rule 3.800(a), Fla. R. Crim. P., is not the proper vehicle to challenge a habitual offender sentence where the Defendant's real target of his challenge is the adjudication as a habitual offender and not the imposition of the sentence.

In *State v. Callaway,* 658 So. 2d 983 (Fla. 1995), this Court recognized and approved the three different types of sentencing errors generally identified in *Judge v. State,* 596 So. 2d 73 (Fla. 2d DCA 1991): (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, Fla. R. Crim. P.; and (3) an "illegal sentence" in which the error must be corrected as a matter of law in a Rule 3.800

proceeding. This Court noted in *Callaway* that Rule 3.800(a) motions should be limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination. This holding must be applied in conjunction with the recognition in *State v. Whitfield,* 487 So. 2d 1045 (Fla. 1986), that Rule 3.800(a) "illegal" sentences arise from situations where the trial court entered a sentence in reliance on a statute but failed to make the specific findings which the statute in question mandatorily required as a prerequisite to the sentence and that the absence of the statutorily mandated findings rendered the sentences illegal.

***Judge* held that a habitual offender sentence is illegal for purposes of Rule 3.800(a) only if (1) the terms and conditions of the sentence exceed those authorized by section 775.084 for the adjudicated offense, or (2) a prior offense essential to categorize the defendant as a habitual offender does not actually exist. The Second District Court held that in either of these circumstances, the sentence does not fall within the maximum authorized by law and is not a sentence a trial court could, as a matter of law, have imposed and such an error can be determined at any time from a review of the defendant's criminal records.**

In the instant case, the Third District disagreed with *Judge*

as to the second circumstance. The logic of *Judge* is that the habitual offender statute increases the legal maximum term. In the present case, habitualization of the Defendant means that for his third-degree felonies, the regular five-year maximum becomes ten. *See* §775.084(c)(3), Fla. Stat. (1993). Under *Judge*, if the Defendant did not truly have the predicate offenses to qualify for habitualization, the maximum should have stayed at five years and anything over that figure is "illegal" within the meaning of Rule 3.800(a).

The Third District finds a flaw in the logic of *Judge*. Habitualization is a two-step process. In the first step, the defendant is adjudicated to be a habitual offender. Once that is done, the trial court knows what the permissible legal maximum may be. In the second step, the court imposes sentence.[1]

For Rule 3.800(a) purposes, the difference between the two steps is important. Rule 3.800(a) is by its terms confined to challenging an "illegal" sentence. Imposition of sentence occurs in the second step of the habitualization process. The Defendant's real target in this case is not the second step but

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[1] *Judge* accepts the theory that habitualization is a two-step process whereby the first step is determining that the defendant qualifies as a habitual offender and the second step is sentencing the defendant. *Judge v. State,* 596 So. 2d at 78. *See King v. State,* 597 So. 2d 309 (Fla. 2d DCA 1992).

the first: the adjudication of the Defendant as a habitual offender.[2] As in *Whitfield,* the trial court entered a sentence in reliance on a statute but did make the specific findings which the statute mandatorily required as a prerequisite to the sentence. The Defendant is now challenging those findings. The Defendant had his opportunity to challenge that adjudication either during the proceeding or on direct appeal or by filing a timely motion pursuant to Rule 3.850, Fla. R. Crim. P. Since the Defendant is actually challenging the adjudication and not the "sentence," a motion pursuant to Rule 3.800(a) is not the proper vehicle.

As traditionally thought of, an illegal sentence is one which exceeds the maximum allowed by law. *See Davis v. State,* 661 So. 2d 1193, 1196 (Fla. 1995). When a Rule 3.800(a) motion alleges that the defendant has received an "illegal" sentence, the traditional inquiry is to examine the face of the judgment

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[2] The *Judge* court found that the lack of written notice of enhancement is important for the second step of the habitualization procedure because the notice "gives the defendant time and opportunity to submit information to convince the trial judge that the extended sentence is not necessary to protect the public." *Judge v. State,* 596 So. 2d 78. The State submits that under the Third District's view in the instant case, the lack of written notice of enhancement would be essential to the first step, where the trial court makes specific findings mandated by the statute as a prerequisite to the sentence. *See State v. Whitfield, supra.*

and the sentencing order to see whether a sentence has been imposed in excess of that allowed by law. Under *Whitfield,* the statutory requirements in this case were met and thus, the Defendant's sentence is legal. From the face of the judgment and the sentencing order, the sentence is not in excess of that allowed by law and an evidentiary hearing is not warranted. The judgments are third-degree felonies. The sentencing order reflects that the Defendant was adjudicated as a habitual offender. Under the habitual offender statute, the legal maximum for a habitual offender for a third-degree felony is ten years. *See* §775.084(4)(a)3, Fla. Stat. (1993). The ten-year sentence imposed by the trial court is within the legal maximum.

In order to determine whether the Defendant's allegations that the habitual offender adjudication did not satisfy the sequential conviction rule, the circuit court would be required to conduct an evidentiary hearing since merely reviewing the judgment and sentencing order would not indicate whether the allegations are true. Although the dates of the convictions are on the face of the documents, the documents do not indicate whether each conviction is sentenced separately from other felony convictions. Even though the date may be the same, a defendant who has multiple cases may be sentenced separately in

each case at different times of the day. For example, a defendant may enter into a plea in the morning in one case and be sentenced at that time knowing that he will proceed to trial in a different case that afternoon. By the afternoon, that defendant may decide to enter into a plea and be sentenced that afternoon. In that circumstance, a defendant would be sentenced to two convictions separately on the same date. This would not satisfy the sequential conviction rule. The trial court would not be able to determine this from merely reviewing the judgment and sentencing orders and an evidentiary hearing would be required. Thus, in the instant case, the Defendant is required to raise this issue in a timely motion pursuant to Rule 3.850.

Essentially, the Defendant's motion alleges that his plea was involuntary, or he received ineffective assistance of counsel, because counsel failed to discover that the predicate convictions did not satisfy the sequential conviction rule. These are classic claims for relief under Rule 3.850. Rule 3.850 is very specific on the point: it states that a Rule 3.850 motion is the proper remedy where the defendant contends "that the plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack...." Fla. R. Crim. P. 3.850(a). Under Rule 3.850, the motion had to be made

within two years, and is thus, time-barred.

The Third District expressed its concern that it is difficult to see why, under the logic of *Judge*, a defendant should be allowed to attack the habitual offender adjudication at any time under Rule 3.800(a), but there would be a two-year time limit under Rule 3.850 for any claim of ineffective assistance or involuntary plea leading up to imposition of the judgments. Rule 3.850 and its time limit should apply uniformly to both situations.

The Third District relied on this Court's decisions in *Callaway* and *Dixon v. State,* 730 So. 2d 265 (Fla. 1999). In *Callaway*, the question was whether Rule 3.800(a) could be used to advance a claim that consecutive habitual sentences had been wrongly imposed in violation of *Hale v. State,* 630 So. 2d 521 (Fla. 1993). This Court's answer was no, because:

> **Whether a *Hale* sentencing error has occurred will require a determination of whether the offenses for which a defendant has been sentenced arose out of a single criminal episode. We agree with the district court that this issue is not a pure question of law. As the district court recognized, 'resolution of this issue depends upon factual evidence involving the times, places, and circumstances of the offense,' *and often cannot be determined from the face of the record. . . .* Resolution of the issue . . . should be dealt with under rule 3.850 which specifically provides for an evidentiary hearing.**

***State v. Callaway,* 658 So. 2d at 988(citations omitted; emphasis**

added).

A practical concern in the present case is that the habitual offender adjudication was the result of a plea bargain. "A rule 3.800 motion can be made at any time, even decades after a sentence has been imposed . . . ." *State v. Callaway,* 658 So. 2d at 988. If a plea can be set aside on this theory years or decades later, renewal of prosecution becomes a practical impossibility. Precisely such considerations have recently led to the imposition of time limits on the right to seek belated appellate relief, which previously had no time limit. *See* Fla. R. App. P. 9.140(j)(3); *McCray v. State,* 699 So. 2d 1366, 1368 (Fla. 1997). The need for reasonable time limits points toward Rule 3.850 and its two-year limitation period.

A case-by-case approach to deciding what is an "illegal" sentence under Rule 3.800(a) is undesirable. It creates great uncertainty in the law and invites large numbers of postconviction motions, each filed in hopes that the definition of "illegal" sentence will be expanded so as to allow consideration of otherwise time-barred claims.

Rule 3.800(a) motions now routinely rely upon the statement in *State v. Mancino,* 714 So. 2d 429, 433 (Fla. 1998), that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" Although

not intended, the statement is being interpreted as saying that any sentencing error which can be gleaned from the face of the record renders a sentence illegal, and may be raised at any time. "The unending debate about what is an 'illegal' sentence for purposes of Rule 3.800(a) stems from the fact that the term 'illegal' is susceptible of multiple meanings." *Hidalgo v. State,* 729 So. 2d 984 n.2 (Fla. 3d DCA 1999)(citations omitted).

The better approach would be to decide what postconviction matters are sufficiently important that they can be raised at any time, and to amend the postconviction rules to identify those matters specifically. The term "illegal sentence" in Rule 3.800(a) should be explicitly defined, or abandoned. *See Hidalgo.*

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court affirm the decision of the Third District Court of Appeal.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to ANDREW STANTON, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this _____ day of _____, 1999.

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