IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,649

JESUS BOVER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

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

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INTRODUCTION

Petitioner, Jesus Bover, was the appellant in the district court of appeal and the petitioner/defendant in the Circuit Court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the respondent/prosecution in the Circuit Court. In this brief, the letter "R." is used to designate the record on appeal, “A.” designates the appendix which accompanies this brief, and “Op.” indicates the opinion on review.

STATEMENT OF THE CASE AND FACTS

On February 11, 1994, the Petitioner, Jesus Bover, was sentenced to concurrent sentences of ten years on each of fifteen third-degree felonies. (R. 67-68). Pursuant to a plea agreement, the court sentenced Mr. Bover to concurrent terms as a habitual offender pursuant to section 775.084, Florida Statutes (1993). *Id.*

On May 15, 1998, Mr. Bover filed a motion to correct illegal sentence pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure. (R. 4-7). In his motion, Mr. Bover alleged that he did not have the prior convictions necessary to categorize him as a habitual offender under section 775.084. (R. 6). Specifically, Mr. Bover alleged that the court relied on contemporaneous convictions to habitualize him, in violation of section 775.084(5). *Id.*

The circuit court summarily denied Mr. Bover's motion as "insufficient." (R. 2). Mr. Bover then appealed to the Third District Court of Appeal, which ordered the state to file a response. (R. 1,8). After receiving the state's response, (R. 9-17), and Mr. Bover's reply, (R. 18-23), the district court appointed the Public Defender to represent Mr. Bover, (R. 51), set the case for oral argument, *id.*, and accepted further replies from counsel, (R. 53-57, 58-65).

The state took the position that Mr. Bover's ten-year sentences were not illegal within the meaning of Rule 3.800(a) because they did not exceed the maximum

sentence for a third-degree felony habitualized pursuant to section 775.084. (R. 3-6). Mr. Bover relied on the Second District's opinion in *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991), which stated that a habitual offender sentence is illegal if the defendant's prior convictions do not qualify for habitual offender status. (R. 5-6). Mr. Bover also argued that his sentence is illegal under this Court's opinion in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998), because it patently fails to comport with the statutory limitations on habitual offender sentencing.

The district court sided with the state. (R. 66-81); (A. 1). In its opinion, the court distinguished between the determination that a defendant qualifies for sentencing under section 775.084 and the actual imposition of the sentence. (Op. 6-7); (R. 71-72). In the first step, the court reasoned, a judge determines what the maximum legal sentence will be; only in the second step does "sentencing" within the meaning of rule 3.800(a) take place. *Id.* The district court concluded that:

> [W]here the challenge is to habitual offender adjudication, the claim is one which must be brought under Florida Rule of Criminal Procedure 3.850, and is subject to that rule's two year time limit.

(Op. 2); (R. 67). The court certified that its decision put it in conflict with the Second District's opinions in *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991), *Bell v. State*, 693 So. 2d 700 (Fla. 2d DCA 1997), and *Botelho v. State*, 691 So. 2d 648 (Fla. 2d DCA 1997), as well as the Fourth District's opinion in *Freshman v. State*, 730 So. 2d

351 (Fla. 4th DCA 1999). (Op. 10); (R. 75).

Judge Sorondo dissented, writing that *Judge*, *Bell*, *Botelho*, and *Freshman* were all correctly decided. (Op. 14-16); (R. 79-81). He also pointed out that Mr. Bover's sentence meets the definition of an illegal sentence set forth by this Court in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). *Id.* In *Mancino*, this Court wrote: "[A] sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal." *Mancino*, 714 So. 2d at 433.

SUMMARY OF ARGUMENT

A defendant may raise improper habitualization pursuant to Rule 3.800(a) so long as the error is apparent on the face of the record. The Third District Court of Appeal's conclusion to the contrary is error. The district court's conclusion relies on the narrow reading of *Davis v. State*, 661 So. 2d 983 (Fla. 1995), which this Court expressly rejected in *Hopping v. State*, 708 So. 2d 263 (Fla. 1998) and *Mancino v. State*, 714 So. 2d 429 (Fla. 1998). Even under the rejected reading of *Davis*, habitual offender sentences may be challenged under Rule 3.800(a) when habitualization results in a sentence that exceeds the legitimate statutory maximum set by section 775.082.

The district court's conclusion that habitualization error is not sentencing error and can never be raised pursuant to Rule 3.800(a) conflicts with decisions from each and every district court of appeal, including the Third District itself. *Ellis v. State*, 703 So. 2d 1186 (Fla. 3d DCA 1997); *Freshman v. State*, 730 So. 2d 351 (Fla. 4th DCA 1999); *Adams v. State*, 724 So. 2d 137, 138 n. 1 (Fla. 4th DCA 1998); *Redd v. State*, 24 Fla. L. Weekly (Fla. 5th DCA June 25, 1999); *Carter v. State*, 704 So. 2d 1068 (Fla. 5th DCA 1998); *White v. State*, 651 So. 2d 726 (Fla. 5th DCA 1995), *affirmed* 666 So. 2d 895 (Fla. 1996); *Oliver v. State*, 24 Fla. L. Weekly D554 (Fla. 1st DCA Feb. 17, 1999); *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991); *Green v. State*, 662 So. 2d 985 (Fla. 2d DCA 1995); *Botelho v. State*, 691 So. 2d 648 (Fla. 2d DCA

1997); *Bell v. State*, 693 So. 2d 700 (Fla. 2d DCA 1997); *Young v. State*, 716 So. 2d 280 (Fla. 2d DCA 1998); *accord Green v. State*, 24 Fla. L. Weekly D1288 (Fla. 2d DCA May 26, 1999); *Ishmael v. State*, 24 Fla. L. Weekly D1024 (Fla. 2d DCA April 21, 1999). The district court's remaining arguments are unpersuasive.

This Court should reverse the decision of the Third District Court of Appeal, and approve *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991); *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). The Court should further remand Mr. Bover's case for proceedings consistent with *Judge*.

ARGUMENT

ILLEGAL HABITUALIZATION PURSUANT TO SECTION 775.084 IS SENTENCING ERROR WHICH MAY BE RAISED BY MOTION PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a).

A sentence which is improperly enhanced pursuant to section 775.084 can be corrected on a Rule 3.800(a) motion. The Third District's conclusion that improper habitualization can never be raised pursuant to Rule 3.800(a) is error. The district court reaches this conclusion by relying on a narrow reading of the term "illegal sentence" which has been rejected by this Court. Even under this incorrect, narrow reading, at least some sentences pursuant to section 775.084 qualify as illegal sentences. The district court further relies on the conclusion that improper habitualization is not "sentencing error." This holding conflicts with decisions from every district court of appeal, including the Third District. The district court's reasons are unpersuasive, and this case must be reversed.

A. The Meaning Of "Illegal Sentence" Under Rule 3.800(a).

Florida Rule of Criminal Procedure 3.800(a) provides:

> A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guideline scoresheet.

Until recently, this Court has defined the term "illegal sentence" more in terms of what it is *not* rather than what it is. *See, e.g., State v. Smith*, 360 So. 2d 21 (Fla. 1978) (vindictive sentencing issue requiring evidentiary hearing not raisable as illegal sentence pursuant to Rule 3.800(a)); *Cusic v. State*, 534 So. 2d 1147 (Fla. 1988) (departure sentence based on impermissible grounds, legal when rendered, not illegal sentence correctable on 3.800(a) motion); *Gartrell v. State*, 626 So. 2d 1364 (Fla. 1993) (downward departure without written reasons not an illegal sentence). The Court identified and corrected particular illegal sentences, *see Anderson v. State*, 267 So. 2d 8 (Fla. 1972), but did not offer a comprehensive definition.

In 1992, writing for the Second District en banc, Judge Altenbernd offered what would prove to be an influential analysis of the meaning of "illegal sentence" for the purposes of Rule 3.800(a). *See Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1992). Although he noted that it "would be difficult, if not impossible, to succinctly state the precise distinctions," 596 So. 2d at 76, Judge Altenbernd wrote:

> Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law. It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process. Unlike a motion pursuant to rule 3.850, the motion can be filed without an oath because it is designed to test issues that should not

> involve significant questions of fact or require a lengthy evidentiary hearing.
>
> * * * *
>
> If for any reason a defendant receives a sentence that exceeds such a maximum possible sentence for the adjudicated crime, the defendant has a fundamental right at all times to seek relief and obtain a sentence that fits within the confines of the law. This can readily be accomplished at any time because the legal issue can be resolved from an examination of the basic public records concerning the adjudicated offense and the resulting sentence.

596 So. 2d at 77. In *Judge* the court considered the kinds of errors which might make a habitual offender sentence pursuant to section 775.084 illegal. The Second District concluded that procedural defects, such as the failure to personally serve a defendant with a habitualization notice, do not make the sentence illegal. 596 So. 2d 77. Where a defendant's priors did not actually qualify for habitual offender treatment, however, the sentence would be illegal. *Id.*

In 1995, this Court relied in part on the *Judge* analysis of illegal sentences in *Callaway v. State*, 658 So. 2d 983 (Fla. 1995), *receded from on other grounds*, *Dixon v. State*, 730 So.2d 265 (Fla. 1999). In *Callaway*, the Court considered whether *Hale*[1] error could be raised by a 3.800(a) motion. The Court wrote that **?**an illegal

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[1]In *Hale v. State*, 630 So. 2d 521 (Fla. 1993), the Court held that a defendant may not be sentenced to consecutive habitual offender sentences for multiple offenses arising out of a single criminal episode.

sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines," and that 3.800(a) motions are ?limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination." 658 So. 2d 988 Because *Hale* issues are decided by a fact-based determination which will require an evidentiary hearing, the Court concluded, they cannot be raised under Rule 3.800(a). *Id.*

The same day, the Court issued its opinion in *Davis v. State*, 661 So. 2d 983 (Fla. 1995). *Davis* posed the question of whether a guidelines departure sentence unsupported by written reasons was an illegal sentence which could be corrected by a 3.800(a) motion. The Court found that its decision in *Gartrell v. State*, 626 So. 2d 1364 (Fla. 1993) controlled:

> We have previously rejected, however, the contention that the failure to file written findings for a departure sentence constitutes an illegal sentence. See Gartrell v. State, 626 So.2d 1364 (Fla.1993) (a sentence to less than the guidelines range without written reasons is not an illegal sentence within the meaning of rule 3.800(a)). We reiterate that conclusion here, concluding that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines.

661 So. 2d 1196. The Court used the "legal maximum" test to explain and resolve an apparent conflict between *Gartrell* and the Court's earlier opinion in *State v. Whitfield*, 487 So. 2d 1045 (Fla. 1986):

> Although we did indicate in dicta in *Whitfield* that the absence of statutorily mandated findings renders a sentence illegal, we did so in summarizing case law that dealt with whether a contemporaneous objection was necessary to preserve an issue for appeal. The actual error at issue in *Whitfield*, however, involved an erroneous scoresheet calculation that we found was to be addressed under rule 3.800. See rule 3.800(a) ("A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guideline scoresheet.") (emphasized language added to rule 3.800(a) in *Whitfield*). In light of the contradiction between the holding in *Gartrell* and our statements in *Whitfield*, we recede from *Whitfield* to the extent that the dicta in that case can be read as holding that the failure to file written findings for a departure sentence constitutes an illegal sentence. Only if the sentence exceeds the maximum allowed by law would the sentence be illegal.

Id. (footnote omitted).

The *Davis* and *Callaway* decisions adopted two important factors from Judge Altenbernd's analysis of illegal sentences in *Judge*. The Court's language in *Davis* concerning sentences above the legal maximum draws a line between those sentences within a court's discretion and those sentences which exceed the court's authority as a matter of law. Procedural irregularities in a judge's exercise of sentencing discretion do not render a sentence illegal; an illegal sentence is a sentence which may not be imposed on a particular defendant for a particular offense without regard to procedural

niceties. The Court's decision in *Callaway*, on the other hand, turned on the idea that illegal sentences do not require detailed evidentiary findings to be discovered. Both of these principles can be found in the passages from *Judge* quoted above.

Some courts placed another interpretation on *Davis* and *Callaway*, however. They read these cases as making the compliance with the statutory maxima in chapter 775 a litmus test for illegal sentences. *See, e.g. Speights v. State*, 711 So. 2d 167 (Fla. 1st DCA. 1998), *quashed Speights v. State*, No. 93,207 (Fla. May 14, 1997).[2] This Court's recent decisions in *Hopping v. State*, 708 So. 2d 263 (Fla. 1998) and *Mancino v. State*, 714 So. 2d 429 (Fla. 1998) have rejected that interpretation of *Davis.*

In *Hopping*, the Court held that a sentence increased in violation of the constitutional prohibition on double jeopardy is an illegal sentence, even where the increased sentence falls below the statutory maximum set forth in section 775.082.[3] The Court adopted the reasoning of Judge Benton's dissent to the First District's opinion in *Hopping*:

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[2]A copy of the Court's order quashing *Speights* appears as Appendix 2 to this brief.

[3]The trial court sentenced Hopping to 60 months on a third-degree felony.

> The court today decides that appellant's claim that his sentence was unconstitutionally lengthened, after he had begun serving it cannot be considered under a rule that provides: "A court may at any time correct an illegal sentence imposed by it...." The opinion in *Davis v. State*, 661 So. 2d 1193 (Fla.1995), should not, in my opinion, be read so narrowly. *A sentence that has been unconstitutionally enhanced is "an illegal sentence ... [in] that [it] exceeds the maximum period set forth by law for a particular offense without regard to the guidelines.*"

708 So. 2d at 265 (emphasis supplied), *quoting Hopping v. State*, 674 So. 2d 905, 906 (Benton, J., dissenting). Thus the Supreme Court concluded that a sentence within the statutory maximum set by section 775.082 could still "exceed the maximum period set forth by law" within the meaning of *Davis. Id.*

The Court made this clearer still in *Mancino v. State*, 714 So. 2d 429 (Fla. 1998). In holding that failure to award jail time credit as required by section 921.161(1), Florida Statutes, may render a sentence illegal, this Court wrote:

> As is evident from our recent holding in *Hopping*, *we have rejected the contention that our holding in Davis mandates that only those sentences that facially exceed the statutory maximums may be challenged under rule 3.800(a) as illegal.* Further, we agree with the observations of Judge Barkdull in the Third District's decision in *Hopping*[4] that a sentence that does not mandate credit for time served would be illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time served. *A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal".*

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[4]*Hopping v. State*, 650 So. 2d 1087 (Fla. 3d DCA 1995).

714 So. 2d at 433 (emphasis supplied). In *Mancino*, as in *Hopping*, the Court also emphasized that an illegal sentence must be apparent without an evidentiary hearing if it is to be raised pursuant to Rule 3.800(a). 714 So. 2d at 433; 708 So. 2d at 265.

B. Improper Enhancement Pursuant To Section 775.084 May be Raised Under Rule 3.800(a).

When a court imposes an enhanced sentence in violation of the substantive requirements of section 775.084, that sentence is illegal. When a trial court imposes a habitual offender sentence on a non-qualifying offense, such as drug possession, or bases the enhancement on non-qualifying priors, as in Mr. Bover's case, the sentence "patently fails to conform with statutory … limitations," and "is by definition illegal." *Mancino*, 714 So. 2d 433. So long as the error can be determined as a matter of law without an evidentiary hearing, the error can be raised by a 3.800(a) motion.[5]

Each court to consider the question in light of *Mancino* has concluded that improper habitualization in violation of section 775.084 renders a sentence illegal. For instance, in *Freshman v. State*, 730 So. 2d 351 (Fla. 4th DCA 1999), the defendant had been habitualized on the basis of out-of-state priors. Under the relevant version of section 775.084, out-of-state convictions could not be used as the basis for

[5]*See* Judge Sorondo's dissenting opinion at Op. 14-15; R. 79-80.

habitual-offender sentencing. *See* § 775.084, Fla. Stat. (1989); *Freshman*; *State v. Johnston*, 616 So. 2d 1 (Fla. 1993); *Baxter v. State*, 616 So. 2d 47 (Fla. 1993). The Fourth District reversed, saying:

> We find illegal a sentence for which the record, in this case the order declaring Freshman a habitual offender, affirmatively shows a failure to comport with the statutory requirements of the habitual offender statute which were not unconstitutional.

730 So. 2d at 352.

Similarly, the First District has concluded that a habitual offender sentence is illegal where it is based on non-qualifying priors, *see Hall v. State*, 24 Fla. L. Weekly D1504 (Fla. 1st DCA June 22, 1999), and where the habitual offender sentence is imposed on an ineligible offense, *see Gayton v. State*, 719 So. 2d 1230 (Fla. 1st DCA 1998); *Nelson v. State*, 719 So. 2d 1230 (Fla. 1st DCA 1998). *See also Calloway v. State*, 24 Fla. L. Weekly D552 (Fla. 1st DCA) (ex post facto application of changes in section 775.084 resulted in illegal sentence). And the Second District has relied on *Mancino* in concluding that a habitual offender sentence imposed on a life felony in violation of *Lamont v. State*, 610 So. 2d 435 (Fla. 1992), was an illegal sentence which could be corrected by a 3.800(a) motion. *See Young v. State*, 716 So. 2d 280 (Fla.

2d DCA 1998);[6] *accord Green v. State*, 24 Fla. L. Weekly D1288 (Fla. 2d DCA May 26, 1999); *Ishmael v. State*, 24 Fla. L. Weekly D1024 (Fla. 2d DCA April 21, 1999); *see also Bain v. State*, 730 So. 2d 296 (Fla. 2d DCA 1999) (en banc).

In this case, the Third District Court of Appeal ignored this Court's decisions in *Hopping* and *Mancino* to reach its conclusion that habitualization error cannot amount to an illegal sentence which may be corrected by 3.800(a) motion. The district court instead relied on the "narrow reading" of *Davis* to reject Mr. Bover's claims:

> 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 and the sentencing order to see whether a sentence has been imposed in excess of that allowed by law. In the case now before us, 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.

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[6]In *Young* the court relied on *Mancino* in rejecting the Fifth District's pre-*Mancino* position in *Carter v. State*, 704 So. 2d 1068 (Fla. 5th DCA 1997), that habitual offender sentences can be illegal only if they exceed the statutory maximum set by section 775.082. *See Young*, 716 So. 2d at 282. Even before *Mancino*, the Second District avoided applying a narrow reading of *Davis* to illegal habitual offender sentences. *See Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991); *Green v. State*, 662 So. 2d 985 (Fla. 2d DCA 1995); *Botelho v. State*, 691 So. 2d 648 (Fla. 2d DCA 1997); *Bell v. State*, 693 So. 2d 700 (Fla. 2d DCA 1997).

(Op. 6-7); (R. 71-72).

The district court relied on the very same reading of *Davis* this Court expressly rejected in *Hopping* and *Mancino*. *See* 708 So. 2d at 265; 714 So. 2d at 413. The court offered no explanation for this, and no discussion of *Mancino* other than to note that *Mancino* should not be read to mean 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." (Op. 12); (R. 77). This may be true, but it does not explain why the district court considered itself at liberty to employ a definition of illegal sentence this Court has unmistakably disowned.

C. Even Under A Narrow Reading Of *Davis*, Improper Habitualization May Result In An Illegal Sentence Which May be Corrected Pursuant To Rule 3.800(a).

The district court's conclusion fails even if one ignores this Court's clear holdings in *Hopping*, and *Mancino*. As demonstrated above, the Third District decided Mr. Bover's case by applying a narrow reading of *Davis*: Only those sentences that facially exceed the statutory maxima may be challenged under Rule 3.800(a) as illegal. *See* (Op. 5-6); (R. 70-71). The Third District referred to this as the "traditional" understanding of illegal sentences. *Id.* Even this erroneous reading of *Davis* fails to support the district court's conclusion.

Under the narrow reading of *Davis*, a habitual offender sentence will be illegal if it (a) is improperly imposed on a defendant or charge not subject to sentencing pursuant to section 775.084, and (b) exceeds the statutory maximum for the offense provided by section 775.082. Thus, a sentence of five years as a habitual offender for third-degree felony cocaine possession would not be illegal, because the same sentence could be imposed in the absence of the erroneous habitualization. A sentence of ten years as a habitual offender for the same offense would be illegal, because the erroneous habitualization caused a sentence in excess of the legitimate statutory maximum. The Fifth District Court of Appeal has taken precisely this approach to illegal sentences under Rule 3.800(a). *See Redd v. State*, 24 Fla. L. Weekly (Fla. 5th DCA June 25, 1999); *Carter v. State*, 704 So. 2d 1068 (Fla. 5th DCA 1998).[7]

The district court attempted to avoid this logic by simply declaring that the determination that a defendant or offense qualifies for sentencing under section 775.084 is not part of "sentencing:"

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[7]In its opinion, the Third District attributes this approach to the Second District's opinion in *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991). In fact, in *Judge* and other opinions, the Second District has maintained that a sentence is illegal "if the defendant was improperly subjected to sentencing as a habitual offender and was entitled to sentencing under the guidelines." 596 So. 2d 77-78.

> In our view there is a flaw in the logic. 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.
>
> 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 the first: the adjudication of defendant as a habitual offender.

(Op. 6); (R. 71).

The Third District offered no explanation for *why* habitualization should not be considered "sentencing" for purposes of Rule 3.800(a). The fact that sentencing under section 775.084 can logically be divided into two or more steps in no way implies that only the last step is "sentencing" for purposes of Rule 3.800(a). The district court cites no authority for its conclusion.

In holding that habitualization can never be challenged by a motion pursuant to Rule 3.800(a), the opinion on review conflicts with every district court of appeal **including the Third District itself.** In *Ellis v. State*, 703 So. 2d 1186 (Fla. 3d DCA 1997), Ellis moved to correct habitual offender sentences imposed on his convictions for possession with intent to sell marijuana and cocaine. The Third District reversed the trial court's denial of the motion. The Fourth District relied on *Ellis* in concluding that "A claim that one has been habitualized on a drug possession charge, when the

statute does not allow such sentencing, is cognizable on a rule 3.800(a) motion." *Adams v. State*, 724 So. 2d 137, 138 n. 1 (Fla. 4th DCA 1998). The Fifth District and the First District have addressed illegal habitual offender sentences pursuant to Rule 3.800(a). *See Redd v. State*, 24 Fla. L. Weekly (Fla. 5th DCA June 25, 1999); *Carter v. State*, 704 So. 2d 1068 (Fla. 5th DCA 1998); *White v. State*, 651 So. 2d 726 (Fla. 5th DCA 1995), *affirmed* 666 So. 2d 895 (Fla. 1996); *Oliver v. State*, 24 Fla. L. Weekly D554 (Fla. 1st DCA Feb. 17, 1999). As discussed above, the Second District has long considered improper habitualization pursuant to Rule 3.800(a). *See Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991); *Green v. State*, 662 So. 2d 985 (Fla. 2d DCA 1995); *Botelho v. State*, 691 So. 2d 648 (Fla. 2d DCA 1997); *Bell v. State*, 693 So. 2d 700 (Fla. 2d DCA 1997); *Young v. State*, 716 So. 2d 280 (Fla. 2d DCA 1998); *accord Green v. State*, 24 Fla. L. Weekly D1288 (Fla. 2d DCA May 26, 1999); *Ishmael v. State*, 24 Fla. L. Weekly D1024 (Fla. 2d DCA April 21, 1999). And in *White v. State*, 666 So. 2d 895 (Fla. 1996), this Court reviewed White's claim that his sentence was illegal because he did not qualify for sentencing as a habitual violent offender.[8]

[8]The Court concluded that White did in fact qualify as a habitual violent offender.

D. The Remaining Arguments Advanced By The Third District Court of Appeal Fail To Support Its Conclusion That Habitualization Error May Not Be Raised Pursuant To Rule 3.800(a).

The opinion on review advances a number of additional arguments in support of its conclusion that habitualization error can never be raised pursuant to Rule 3.800(a). None of these is persuasive.

The fact that a defendant *could* have conceivably raised an illegal habitual offender sentence pursuant to Rule 3.850 is irrelevant to the question of whether he or she may raise it pursuant to Rule 3.800. In support of its decision in this case, the district court wrote:

> Boiled down, 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 time-barred.

(Op. 7); (R. 72). Any case where counsel fails to object to an illegal sentence will almost certainly involve ineffective assistance of counsel which could be raised pursuant to Rule 3.850. *Cf. Mizell v. State*, 716 So. 2d 829 (Fla. 3d DCA 1998). This recognition, however, in no way implies that such an illegal sentence may not also be

raised under Rule 3.800(a). For instance, the fact that jail-credit issues may be raised pursuant to Rule 3.850 does not prevent them from being raised under Rule 3.800(a). *See Mancino v. State*, 714 So. 2d 429, 431-32 (Fla. 1998), *quoting Chojnowski v. State*, 705 So. 2d 915, 917-19 (Fla. 2d DCA) (Altenbernd, J., dissenting).

The district court's attempt to analogize habitualization error to errors in a judgment of conviction is also unpersuasive. In its opinion, the district court posits the hypothetical case of a defendant convicted of a second-degree felony:

> Assume that the evidence was legally insufficient to establish one of the required elements of the offense, without which the crime is a third-degree felony carrying a legal maximum of five years. Assume that through ineffective assistance of counsel, this issue is not raised in the trial court. Defendant is convicted of the second-degree felony and sentenced to the legal maximum of fifteen years.
>
> In this hypothetical case, the error is subject to correction under Rule 3.850 if the defendant files the motion within the required two-year time limit. If, however, the defendant does not file the motion until after the time has run, then the defendant's claim will be time-barred.
>
> It is difficult to see why, under the logic of *Judge* and the other cited cases, 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.

(Op. 8); (R. 73).

The district court's opinion complains that it is difficult to see why *Judge* draws a line that permits improper habitualization to be addressed at any time pursuant to Rule 3.800(a), while an improper conviction may only be addressed within two years under Rule 3.850. *Id*. This can only be because the court misapprehends the logic of *Judge*. *See* note 7, *supra*. *Judge*'s explanation of how the Rule 3.800(a) line is drawn is quite clear:

> Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law. It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process. Unlike a motion pursuant to rule 3.850, the motion can be filed without an oath because it is designed to test issues that should not involve significant questions of fact or require a lengthy evidentiary hearing.

596 So. 2d 77; *accord Mancino*, 714 So. 2d 432; *Callaway*, 658 So. 2d 987-88. This Court drew the line between errors in the judgment of conviction and sentencing errors when it adopted Rule 3.800(a). As *Judge* explains, some (but not all) sentencing errors can be attacked via Rule 3.800(a) because the "terms and conditions of the punishment for a particular offense are [impermissible] as a matter of law," and the errors may be established without a lengthy evidentiary inquiry. Habitualization errors

like those raised by Mr. Bover in his petition satisfy the requirements of Rule 3.800(a) and therefore may be corrected.

The district court's conclusion that habitualization error can never be raised pursuant to Rule 3.800(a) is not supported by this Court's decision in *Calloway v. State*, 658 So. 2d 983 (Fla. 1995). *See* (Op. 8-9); (R. 73-74). In *Calloway*, the Court held that *Hale*[9] error – the imposition of consecutive habitual-offender sentences for offenses arising out of a single criminal episode – cannot be raised by 3.800(a) motion. *Hale* error has nothing to do with whether or not a defendant is properly habitualized. Instead, *Hale* is violated when properly imposed habitual offender sentences are ordered to run consecutively even though the offenses arise from a single episode. In *Callaway* the Court determined that *Hale* error could not be raised pursuant to Rule 3.800(a) because the inquiry was a fact-based one requiring a detailed evidentiary determination of time, place and circumstance. *See Hale*, 658 So. 2d at 988. The Court's reasoning in *Callaway* simply does not apply to situations where it is apparent on the face of the record that a defendant or offense does not qualify for sentencing pursuant to section 775.084.

[9]*Hale v. State*, 630 So. 2d 521 (Fla. 1993).

The possibility that some habitualization issues may fall outside Rule 3.800(a) does not imply that all do. In the opinion on review, the district court conceded that most motions challenging the viability of predicate offenses for habitualization can be resolved on the face of the record. (Op. 9); (R. 74). The court theorized, however, that other claims might require an evidentiary inquiry, implying that this made Rule 3.800(a) inappropriate for *all* habitualization claims. (Op. 9-10); (R. 74-75). While this may be so, it does not imply that habitualization errors apparent on the face of the record can not be raised under Rule 3.800(a). This Court dealt with a directly analogous situation in *Mancino*. Some jail-credit issues may require an evidentiary determination. When, however "it is affirmatively alleged that the court records affirmatively demonstrate on their face an entitlement to relief," jail-credit is correctable on a Rule 3.800(a) motion. *Mancino*, 714 So. 2d 433.

CONCLUSION

The Third District Court of Appeal has held that error in subjecting a defendant to an enhanced sentence can never be corrected pursuant to Rule 3.800(a), no matter how obvious that error may be. To reach this conclusion, the court applied the narrow interpretation of the term "illegal sentence" which this court expressly rejected. *See Hopping v. State*, 708 So. 2d 263 (Fla. 1998) and *Mancino v. State*, 714 So. 2d

429 (Fla. 1998). Even the district court's erroneous definition does not support its conclusion that habitualization errors are unreachable under Rule 3.800(a), a conclusion that puts the opinion on review in conflict with decisions from every district court of appeal. This Court should reverse the Third District's decision, approve the reasoning of the Second District in *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991), and remand for proceedings consistent with *Mancino*, *Hopping*, and *Judge*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Lara J. Edelstein, Assistant Attorney General, Office of the Attorney General, Appellate Division, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301, this ____ day of July, 1999.

_____
ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

_____

Andrew Stanton
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,649

JESUS BOVER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

APPENDIX TO BRIEF ON THE MERITS

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