IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,649

JESUS BOVER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY 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.

ARGUMENT

THE STATE'S ANSWER BRIEF FAILS TO REPLY TO ANY OF THE PETITIONER'S ARGUMENTS AGAINST THE OPINION BELOW.

The Respondent's brief does nothing more than regurgitate – verbatim and without attribution – the district court's opinion. Consequently, it fails to respond to any of the criticisms offered by the Petitioner's brief or the dissenting opinion of Judge Sorondo. Although the state does appear to advance two new arguments, neither is relevant.

A. The State Fails to Support Or Explain The Decision On Review.

The Petitioner's brief pointed out that the opinion on review employs a narrow reading of the term "illegal sentence" which this Court expressly rejected in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998), and *Hopping v. State*, 708 So. 2d 263 (Fla. 1998). *See* Brief of Petitioner on the Merits at 12-17. The Petitioner also criticized the court's opinion for its unsupported and unexplained conclusion that, because sentencing under section 775.084 can be divided into two steps, the first step is somehow not "sentencing" for purposes of Rule 3.800(a). *See* Brief of Petitioner at 19-21. The state's brief makes no attempt whatsoever to respond to these or any

other arguments made by the Petitioner.

After two introductory paragraphs, Brief of Respondent at 6-7, the state's brief simply repeats the words Judge Cope wrote in parts III and V of his opinion, embroidering them with a few footnotes and introductory sentences.[1] Because the state merely repeats the lower court's opinion, it naturally fails to reply to criticism of the opinion's shortcomings.

It is worthwhile to note that as a result the following points are unrebutted:

- The district court's opinion conflicts with this court's opinions in *Hopping* and *Mancino*. *See* Brief of Petitioner at 12-17.

- There is no justification in law or logic for the district court's conclusion that the determination that a defendant qualifies for habitual offender sentencing is not a sentencing decision for the purposes of Rule 3.800(a). *See* Brief of Petitioner at 19-21.

- The district court's opinion puts it in conflict with every district court of appeal in Florida, including the Third District itself.[2] *See* Brief of Petitioner at -14-16, 19-21.

- Contrary to the district court's suggestion, *see* Op. at 7, the fact that a particular claim *could* be raised as ineffective assistance of counsel

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[1]Appendix 1 to this brief represents the Respondent's brief as changes to parts III and IV of the court's opinion in underline/~~strikeout~~ form.

[2]After the state filed its brief, the Third District Court of Appeal issued another opinion which appears to conflict with the opinion on review. In *Marrero v. State*, No. 99-1987, 1999 WL 765949 (Fla. 3d DCA September 29, 1999), the court reversed the trial court for its failure to grant a Rule 3.800(a) motion where the appellant had been sentenced as an habitual offender for possession of cocaine.

pursuant to Florida Rule of Criminal Procedure 3.850 in no way implies that the same claim cannot be addressed under Rule 3.800(a) if it involves an illegal sentence. Indeed *all* illegal sentences are presumably the result of ineffective assistance of counsel. *See* Brief of Petitioner at 21-22.

- The district court's opinion is not supported by this Court's decision in *Calloway v. State*, 658 So. 2d 983 (Fla. 1995), *receded from on other grounds, Dixon v. State*, 730 So.2d 265 (Fla. 1999). *See* (Op. 8-9). The Court's decision in *Callaway* turned on the fact that the determination of whether or not sentences resulted from a single criminal episode was a fact-based decision requiring a detailed evidentiary determination. *See* Brief of Petitioner at 24-25.

The flaws in the district court's reasoning are so serious and apparent that the state does not even try to confront them.

B. The State's Argument Based On *State v. Whitfield* Is Illogical.

The Respondent's chief innovation on Judge Cope's opinion is to invoke this Court's opinion in *State v. Whitifield*, 487 So. 2d 1045 (Fla. 1986). The state's use of *Whitfield*, however, is illogical.

The state cites *Whitfield* for the proposition that the absence of statutorily mandated findings renders a sentence illegal. Brief of Respondent at 7, *see Whitfield*, 487 So. 2d at 1046. The state then argues that because the trial court made the findings required by section 775.084, the resulting sentence is legal: "Under *Whitfield*, the statutory requirements in this case were met and thus, the Defendant's sentence is

legal."[3] Brief of Respondent at 9. But *Whitfield* never suggested that a sentence is illegal *if and only if* the court fails to make the required findings.[4] While *Whitfield* suggests that the failure to make required findings is sufficient to render a sentence illegal, it never says such a failure is *necessary*.

In any event, the validity of the *Whitfield* language on which the state relies is questionable. This court receded from it as dicta in *Davis v. State*, 661 So. 2d 1193, 1196 (Fla. 1995).

C. The State Has Already Conceded That The Petitioner Was Habitualized Using Contemporaneous Convictions.

The Respondent's second innovation on Judge Cope's opinion is to conjecture that an evidentiary hearing may be necessary to eliminate the possibility that the Petitioner was convicted and sentenced in separate morning and afternoon sessions of the same court on the same day. The state, however, has already conceded that the

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[3]The state's reliance on *Whitfield* is puzzling. The *Whitfield* rule applied by the state is contrary to the narrow or "traditional" reading of *Davis* (only sentences which exceed the statutory maximum are illegal) on which the lower court's opinion rests.

[4]The state apparently assumes that the proposition "A sentence entered without the required findings is illegal," implies "All illegal sentences are entered without the required findings." This is exactly as valid as the assumption that "Socrates is a man," entails that "All men are Socrates."

Petitioner was habitualized based on contemporaneous convictions in violation of section 775.084(5). In its order dated March 3, 1999, the district court directed counsel for both sides to address several questions, including: "Whether the prior convictions used to habitualize appellant fail to satisfy subsection 775.084(5), Florida Statutes (1993)." (A. 2). The state replied that the convictions did indeed fail to satisfy subsection 775.084. *See* State of Florida's Supplemental Memorandum at 3-4; (A. 3).

CONCLUSION

The district court's opinion depends on a narrow reading of the term "illegal sentence" which this Court has rejected, *See Hopping v. State*, 708 So. 2d 263 (Fla. 1998) and *Mancino v. State*, 714 So. 2d 429 (Fla. 1998), and the unsupported assumption that only the last step of a multi-step sentencing process may be considered "sentencing." The Respondent's brief does not even attempt to answer these or other criticisms of the district court's opinion. 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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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Michael J. Neimand, Bureau Chief-Criminal Division, and Lara J. Edelstein, Assistant Attorney General, Office of the Attorney General, Appellate Division, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301, this 1st day of October, 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

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APPENDIX TO BRIEF ON THE MERITS

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