IN THE SUPREME COURT OF FLORIDA

THOMAS SERGIO BURGESS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC00-1724

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

TABLE OF CITATIONS

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case with the following additions and corrections:

Thomas Burgess, hereinafter referred to as the "petitioner," was charged in case **88-705** with the offenses of burglary/dwelling (victim, Rosalin R. Dixon) [count 1] and possession of burglary tools [count 2]; the offenses occurring on January 15, 1988. (R8-9). Petitioner was charged in case **88-8295** with the offenses of burglary/dwelling (victim, Rocky Rodriquez) [count 1] and possession of burglary tools [count 2]; the offenses occurring on June 8, 1988 (R21-22). On August 8, 1988, petitioner entered an open plea to all charges in cases **88-705** and **88-8395** [as well as case **88-0933** (failure to appear)] (R8). Petitioner was sentenced in case **88-705** to 15 years imprisonment, suspended after 5 years and placed on probation for 10 years for count 1 (burglary/dwelling) to run concurrent with count 1 in case **88-8295** (R 48-51) and on count 2 (possession of burglary tools] was sentenced to a suspended 5 years imprisonment to run consecutive to count 1 (R52). In case **88-8295,** petitioner was sentenced to 15 years imprisonment, suspended after 5 years and placed on probation for 10 years for count 1 (burglary/dwelling) to run concurrently with count 1 in case **88-705** (R54-57) and on count 2 (possession of burglary tools), and was given a 5 year suspended sentence to run consecutive with count 1 and consecutive to count 2 in case **88-705** (R57-58)

In case **89-15634,** petitioner was subsequently charged with the offenses of burglary of a structure (victim, John Stevens) [count 1], grand theft (money, the property of John Stevens), possession of burglary tools [count 3] and resisting arrest without violence [count 4]; all offenses occurring on September 21, 1989 (R33-34). The criminal report affidavit reflects the following:

> A known person forceably (sic) entered the listed firm by prying open a bathroom window on the north side of this firm. This person then entered the firm and removed currency ($593.54) from an unlocked file cabinet. This person then exited the firm with this property, and fled on foot. This person had no right to enter the firm or removed (sic) this property. Upon apprehension of this person the affiant found him to have a screw driver in his pocket, which was used to gain entry. This person ran from the police when ordered to halt, and also gave a false name of Tyrone Anthony Jones, D.O.B. of 6/8/66.
>
> The Def. is the person observed fleeing from the above mentioned point of entry (by affiants). The Def. had property in his possession which was identified as property taken from the listed firm. The interior of the point of entry had water spraying everywhere from a broken sink line and the Def.s clothing was soaking wet. The defendant was identified by T.P.D. fingerprint comparison. He was identified as being the listed person, with T.P.D. Number 287-657.

(R32)

On January 22, 1990, it appears that a plea agreement was signed by the petitioner (it is not known from this document if the state was a party to this agreement) wherein that, in return for

pleas of guilty to the new offenses in case **89-15634** and admitting to violating his probation in cases **88-705, 88-8295, and 88-08933,** petitioner would be sentenced as follows:

89-15634:
Cnt 1: 10 years FSP Habitual Felony Offender
Cnt 2: 5 years FSP consecutive Habitual Offender
Cnt 3: 5 years consecutive FSP Habitual Offender
Cnt 4: Time served

VOP Recommendations
88-705: Cnt 1: 15 years FSP concurrent (credit for 5 years)
Cnt 2: 5 years FSP concurrent (credit for 5 years FSP)

88-08295: Cnt 1: 15 years FSP concurrent (Credit for 5 years FSP)
Cnt 2:5 years FSP concurrent (Credit for 5 years FSP)
88-08933: 5 years FSP concurrent

(R46)

Petitioner executed a form stipulating that he qualified for sentencing as a habitual felony offender in case **89-15634** (R44). On January 22, 1990, petitioner was sentenced in case **89-15634** to 10 years imprisonment as a habitual felony offender for count 1 (burglary/structure), 5 years consecutive HFO for count 2 (grand theft); 5 years consecutive for count 3 (possession of burglary tools) and time served for count 4 (obstructing or opposing an officer without violence) (R37-43). Petitioner was also sentenced in the violation of probation cases to the terms of imprisonment as set forth in the plea form, which were to run concurrently with the habitual sentences imposed in case **89-15634** (R 11-16, 23-28).

In April of 1999, the petitioner filed a pro se motion to

correct illegal sentence pursuant to Fla. R. Crim. Pro. 3.800(a), arguing that the consecutive habitual felony offender sentences imposed in case **89-15634** were illegal because the offenses occurred during the same criminal episode, contrary to Hale v. State, 630 So.2d 521 (Fla. 1993) and Calloway v. State, 658 So.2d 983 (Fla. 1995). He further asserted that the trial court had jurisdiction to entertain the motion under Fla. R. Crim. Pro 3.800(a) because there was no need for an evidentiary hearing because the facts necessary to establish that the offenses occurred during the same criminal episode are not in dispute and are matters of record reflected in the police report, affidavits, and the factual basis given at the time the plea was entered. Petitioner included as attachments to his 3.800(a) motion, copies of the police report and arrest affidavit (copies attached as an appendix to this brief as Respondent's Exhibit 1)[1].

The trial rendered an order in December of 1999, denying the motion to correct illegal sentence with attachments (copies

[1] The motion to correct illegal sentence was not included in the record of appeal, nor was the order denying the motion. Respondent is filing contemporaneously with its answer brief a motion to supplement the record, requesting that this court enter an order directing the Clerk of the District Court of Appeal to supplement the record on appeal with copies of the motion to correct illegal sentence with attachments thereto, the order denying the motion and also the "second addition" to the record on appeal consisting of pages 64-67 of the record on appeal, which were not included in the record sent to this Court by the Second District Court of Appeals. All of these documents are presently in the custody of the Second District Court of Appeal.

attached as an appendix to this brief as Respondent's Exhibit 2)[2]. The court relied upon the decision in Callaway, *id*. and ruled that such a motion had to be filed by way of a rule 3.850 motion and that petitioner failed to file such a motion prior to February 9, 1996, when the window period for filing Hale errors closed; and, therefore, his motion is untimely.

Petitioner timely filed a notice of appeal from the trial court's summary denial of 3.800(a) motion. The Second District Court of Appeal ordered the clerk of circuit court to supplement the record on appeal with the following items:

> The information, any police reports, any written plea agreement, and the judgment and sentence in case no. 89-15634-E.
>
> The sentences in case nos. 88-00705 and 88-08295. The sentences most likely dated 1/22/1990.

(R 1). The Clerk of Circuit Court responded by sending to the Second District Court of Appeal a "second addition" consisting of pages 64-67 of the record on appeal (copy attached as an appendix to this brief as Respondent's Exhibit 3)[3]. The police report attached to the record on appeal in response to the order of the Second District consists of a copy of the police report that was originally attached to the petitioner's motion to correct illegal sentence as marked thereon as "Exhibit A" and date stamped April 23, 1999, the date the motion to correct illegal sentence was

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[2] See footnote 1.

[3] See footnote 1.

filed. (See appendix Respondent Exhibit 3 - omitted pages 64-66 of the record on appeal). The Second District in its opinion in Burgess v. State, 764 So.2d 749 (Fla. 2d DCA 2000) "reluctantly" affirmed a trial court ruling that a Hale error must be raised by a 3.850 motion and that this, a 3.850, was time barred in the petitioner's case. *Id.* at 750. The district court stated, however:

> If the trial court were allowed to rely, as a matter of law, upon the sworn testimony of the arresting officer in the criminal report affidavit, which is in the court file, it would be clear that the offenses arose from a single criminal episode. We conclude, however, that under the supreme court's decision in *State v. Callaway*, 658 So.2d 983 (Fla. 1995), Mr. Burgess was compelled to file a timely motion pursuant to rule 3.850 to resolve this issue and cannot rely upon the arrest affidavit at this time.

Id.

The district court further stated:

> We affirm with reluctance because we are convinced to a moral certainty by the content of the police report that the grand theft and the burglary were committed in one criminal episode. Moreover, it is obvious that the screwdriver was classified as a burglary tool only because its use occurred in connection with the breaking and entering.

Id. at 750-751.

The district court certified the following question as one of great public importance:

> AFTER THE HOLDING IN *CALLAWAY*, CAN A TRIAL COURT RELY UPON A SWORN ARREST REPORT IN THE COURT FILE TO DETERMINE, AS A MATTER OF LAW, THAT CONSECUTIVE HABITUAL OFFENDER

SENTENCES ARE ILLEGAL?

SUMMARY OF THE ARGUMENT

The answer to the certified question is no. A trial court cannot rely upon a sworn arrest report (police report) (or the criminal report affidavit) contained in the court file to determine as a matter of law that petitioner's consecutive habitual felony offender offenses occurred during a single criminal episode. Such documents are hearsay and are not admissible to prove the truth of the matters contained therein, the truthfulness of which must be established as to time, place, and circumstance in order to determine if the offenses occurred during a single criminal episode. Nor can the court take judicial notice of such documents even if they are in the court files, nor do those documents come under the public records exception of the hearsay statute.

ARGUMENT

ISSUE

> CERTIFIED QUESTION: AFTER THE HOLDING IN CALLAWAY, CAN A TRIAL COURT RELY UPON A SWORN ARREST REPORT IN THE COURT FILE TO DETERMINE, AS A MATTER OF LAW, THAT CONSECUTIVE HABITUAL OFFENDER SENTENCES ARE ILLEGAL.

Respondent submits that the answer to this question is no. The sworn arrest report (police report)[4] relied upon by the appellate court in Burgess v. State, 764 So2d 749, 750-751 (Fla. 2d DCA 2000) and the appellate court's comment regarding the arresting officer's criminal report affidavit (R31-32), *id.* at 750, cannot be considered as a matter of law to determine that the imposition of consecutive habitual offender sentences was illegal because the offenses occurred during a single criminal episode. The lower court (both the trial court and/or the Second District Court of Appeal) would have to be considering those documents as truthful statements of fact -establishing the time, place, and circumstance of each offense - in order to establish that the offenses occurred during a single criminal episode. However, these documents cannot be considered as truthful statements of fact because there are hearsay statements[5].

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[4]See appendix Respondent's Exhibit 3.

[5]The arguments presented in this merits brief were never made at the trial level or on appeal to the Second district because the matter was handled summarily by both the trial court and the district court of appeal, and neither the state attorney at the trial level not the attorney general on appeal was requested to respond. However, a conclusion or decision of a trial court should

This Court in Bolin v. State, 736 So.2d 1160, at 1167 (Fla. 1999) stated that, "police reports are hearsay." The fact that the police report or the criminal report arrest affidavit may be in the court record does not make the hearsay statements contained therein admissible. The statements contained in the police report or the criminal arrest affidavit are hearsay because it "is a statement, other than one made by the declarant while testifying at trial or hearing, offered as evidence to prove the truth of the matter asserted." §90.803(1)(c), Fla. Stat. (1999). Moreover, the hearsay statement in question were not subject to cross-examination, and do not fall under any recognized exception to the hearsay rule. Stoll v. State, 762 So.2d 870, at 876 (Fla. 2000).

Furthermore, neither the criminal report nor the criminal report affidavit could be considered merely because they are part of the court record. As this Court stated in Stoll, *id* at 876-877:

> Although a trial court may take judicial notice of court records, *see* §90.202(6), Fla. Stat. (1997), it does not follow that this provision permits the wholesale admission of hearsay statements contained within these court records. We have never held that such otherwise inadmissible documents are automatically admissible just because they were included in a judicially noticed court file. *Cf. Allstate Ins. Co. v. Greyhound Rent-A-Car,* 586 So.2d 482, 483 (Fla. 4th DCA 1991) ('[T]he fact that a deposition may be judicially noticed does not render all that is in it admissible.')...To the contrary, we find

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be affirmed, even when based on erroneous reasoning, if evidence or an alternative theory supports it. Caso v. State, 534 So.2d 4322 (Fla. 422 (Fla. 1988).

> that documents contained in a court file, even if that entire court file is judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere.

It is even questionable as to whether the police report was ever part of the court record or court file at the time of the sentencing hearing. Although the criminal report affidavit was part of the court file (R31-32)[6], it was filed on September 22, 1989; there is no indication that the police report was ever part of the original lower court record. To the contrary, it appears that the police report came to light only because it was attached as an exhibit to the petitioner's 3.800(a) motion as an exhibit and was filed for the first time along with that motion on April 23, 1999[7]. This is further evidenced by the fact that when the Second District Court of Appeal entered an order requiring the Clerk of The Circuit Court to supplement the record on appeal with the police report (R1), the clerk of the circuit court complied by simply attaching a copy of the police that was filed by the petitioner as "Exhibit A" with his motion to correct illegal sentence which was originally filed with the circuit court in April

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[6]The Second District noted in its opinion that the criminal report affidavit was part of the court file. Burgess v. State, 764 So.2d 749, at 750 (Fla. 2d DCA 2000):

> ...If the trial court were allowed to rely, as a matter of law, upon the sworn testimony of the arresting officer in the criminal report affidavit, ***which is in the court file***...

[7]See appendix Respondent's Exhibit 1 - Petitioner's Motion to Correct Illegal Sentence, Exhibit A therein.

of 1999.[8]

Nor is the police report or the criminal arrest affidavit admissible into evidence as an exception to the hearsay rule as a public record because the public records exception specifically excludes in criminal cases matters observed by police officers or other law enforcement personnel:

> §90.803(8), Fla. Stat. (1999): PUBLIC RECORDS AND REPORTS. Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to the authority imposed by law as to which there was a duty to report, ***excluding in criminal cases matters observed by a police officer or other enforcement personnel***, unless the sources of the information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(Emphasis added)

Obviously, if the state sought to establish that the offenses occurred during a single criminal episode by seeking to introduce into evidence or to rely upon the police report or the criminal report affidavit, the defense would vehemently object on grounds of hearsay. Just as the petitioner would have the right to demand the presence of the police officer to testify as to the factual matters pertinent to determining if the offenses occurred during a single criminal episode - the time, place, and factual circumstances of

[8]See appendix Respondent's Exhibits 2 and 3.

the offenses - the respondent, State of Florida, also has the right to demand the presence of the police officer to establish that the offenses did not occur during a single criminal episode. However, once the testimony of a witness is required to establish the factual basis for a legal determination, then we are dealing with matters requiring an evidentiary hearing; and this requires a 3.850 proceeding, not a 3.800 proceeding; and in the instant case, all parties agree that a 3.850 proceeding is time barred.

Petitioner's reliance on Parker v. State, 633 So.2d 72 (Fla. 1st DCA 1994) is without merit because it factually and legally distinguishable from the present case. In Parker, the appellate court was dealing with a direct appeal, not a post conviction rule 3.800(a) appeal under Fla. R. App. Pro. 9.140(i) (2000). Parker's reliance on the police report because it was part of the record was improper because it was hearsay . (see argument above and citations therein.) Additionally, in Parker, no one challenged the accuracy of the report at the trial or on direct appeal to the district court. *Id.* at 73. In the instant case, the state was never given an opportunity to object to the use of the criminal report or the criminal report affidavit, either at the trial level or on direct appeal to the district, because the 3.800 motion was handled summarily by the trial and the district appellate court under Fla. R. App. Pro. 9.140(I).

Petitioner's reliance on Gramegna v. Parole Commission, 666

So.2d 135 (Fla. 1996) is also without merit because that case is legally distinguishable. The arrest report was admissible in that case because the statute relating to control release eligibility specifically authorizes the parole commission to rely on such documents. As this Court stated therein:

> Although section 947.146, Florida Statutes (1991) is silent as to whether the authority may use documents other than the judgment of conviction as a basis for determining eligibility for control release, the legislature has clarified its intent, amending the statute to read:
>
> > In making control release eligibility determinations under this subsection, the authority may rely on any document leading to or generated during the course of the criminal proceeding, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to the circumstances of the offense
>
> We conclude that the amendment refers to documents contained in the court file and means what it says...

Id. at 137.

There is no such statutory authority in regard to the present legal proceedings. To the contrary, based upon the argument and case law cited by the respondent earlier, documentation in question is not admissible in the present proceeding.

Petitioner's reliance on Dugger v. Grant, 610 So.2d 428 (Fla. 1993) is also without merit because that case also is legally distinguishable. As this Court stated therein, "The award of

provisional credits is a procedure utilized by the Department of Corrections to reduce prison population and **is not a substantive matter of punishment or reward.**" *Id.* at 430 (Emphasis added). This Court further stated that:

> Because **provisional credits** are solely implemented to relieve prison overcrowding, **are in no way tied to an inmates overall length of sentence**, and create no reasonable expectation of release on a given date, no substantive or procedural "liberty" due process vest in an inmate under the under the statute. We note that even if section 944.277 did vest due process rights in an inmate, the level of evidence necessary to deny provisional credits would not rise to that necessary to convict; nor would the Secretary's determination necessarily be subject to second-guessing on review.

Id. at 432 (Emphasis added)

In the instant case, the matter of whether consecutive habitual felony offender sentences can be imposed *is a substantive matter of punishment;* the matter *is tied to an inmates overall length of sentence.* Therefore, based upon the argument and case law cited by the respondent earlier, documentation in question is not admissible in the present proceeding.

Petitioner's reliance upon Adams v. State, 755 So.2d 678 (Fla. 2d DCA 1999) is without merit because as stated earlier, the police report and criminal report affidavit, even if included in the court record, are hearsay and are not admissible to prove the truth of the facts contained therein.

Petitioner's reliance on State v. Mancino, 714 So.2d 429 (Fla.

1998) is also without merit again because that case is distinguishable. A defendant could raise a credit-for-time-served issue in a 3.800(a) motion if the matter can be resolved from the contents of the court file. Such jail records are exceptions to the hearsay rule because they are public records, they are "Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to the authority imposed by law as to which there was a duty to report," and they do not come under the exclusion of "criminal matters observed by a police or other law enforcement personnel" under §90.803(8). However, it is because the exception to the hearsay rule does not apply to "criminal matters observed by a police or other law enforcement personnel" that police reports and criminal report affidavits are not admissible to establish the truth of the facts contained therein; and the fact that such police reports or criminal affidavits are in the court file does not make them admissible in these post-conviction proceedings. Stoll v. State, *supra* at 876-877.

Respondent, should he file a reply brief, may cite to this Court the case of Valdes v. State,765 So.2d 774 (Fla. 1st DCA 2000). In that case, the appellate court found that the trial court could have treated an untimely 3.850 motion as a 3.800(a) motion to correct an illegal sentence because of a Hale error,

"[b]ecause his Hale claim is apparent on the face of the record". *Id.* at 777. That case is also factually distinguishable from the present case. The court in Valdes was relying upon the trial transcript, which was part of the record from a previous direct appeal. *Id.* at 775. That case did not involve inadmissible hearsay contained in police reports or criminal report affidavits, which, as stated earlier, are not subject to judicial notice nor are they public record exceptions to the hearsay rule.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the lower court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 21st day of November, 2000.

_____
COUNSEL FOR RESPONDENT

IN THE DISTRICT COURT OF APPEAL
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THOMAS SERGIO BURGESS,

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_____/

INDEX TO APPENDIX OF EXHIBITS

COMES NOW the Attorney General, by and through the undersigned Assistant Attorney General, who files this Appendix wherein Respondent has tabbed the first page of every appendix document and cross-referenced the index tab number to the appropriate item on the index: