ORIGINAL

IN THE SUPREME COURT OF FLORIDA



Case No. : SCOO-1843
Lower Tribunal No.: 1D00-0816

**EDUARDO VALENZUELA,**
**Petitioner,**

**vs.**

**STATE OF FLORIDA**
**Respondent.**

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# BRIEF OF PETITIONER ON THE MERITS

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

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**IN THE SUPREME COURT OF FLORIDA**

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# BRIEF OF PETITIONER ON THE MERITS

## INTRODUCTION

Petitioner, Eduardo Valenzuela, 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.

## STATEMENT OF THE CASE AND FACTS

On November 20, 1990, the petitioner, Eduardo Valenzuela, was sentenced to a total effective sentence of natural life imprisonment under the Habitual Offender Act, § 775.084. (Fla. Supp. 1988) (R. 1-10), for crimes committed on September 28, 1989. (R. 11, 13) The petitioner was found guilty after trial by jury. (R. 35) The guidelines called for a sentence of 15 years imprisonment. (R. 11)

On October 18, 1999, petitioner, pro se, filed a motion to correct illegal sentence, pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure (R. 12-15), and State v. Mancino, 714 So.2d 429 (Fla. 1998). In this motion, petitioner alleged that the trial court had used out-of-state convictions as predicate offenses on which his habitual sentence was based (R. 12, 13), a violation of § 775.084(1)(a)1 (1988 Supp.), and stated that this error could be found on page 33, lines 4-7 of sentencing hearing transcript. (R. 13)

The circuit court denied petitioner's motion on February 8, 2000, without a determination, relying on findings in previous orders of denial, and attached all of petitioner's previous filings to this instant order of denial. (R. 16-88) On February 14, 2000, petitioner filed a motion for rehearing (R. ), noticing the circuit court that the Florida Supreme Court, in Baxter v. State, 616 So.2d 47 (Fla. 1993), and State v. Johnson, 616 So.2d 1 (Fla. 1993), clearly acknowledged that "Chapter 89-280, Laws of Florida, is the only authority for considering prior out-of-state felony convictions as the basis

for sentencing as an habitual felony offender ..." Further, petitioner cited Parrish v. State, 571 So.2d 97, 98 (Fla. 1st DCA 1990), as controlling authority that the amendment to § 775.084, Fla. Stat. (1989), (the authority for allowing out-of-state convictions as predicates to habitualiae), could not be applied before its effective date of October 1, 1989. (R. ) The circuit court did not respond to the motion for rehearing.

Petitioner filed a timely notice of appeal on February 28, 2000. (R. 93) On March 8, 2000, petitioner filed a motion for order correcting or supplementing the record to include the motion for rehearing. (R. ) The district court granted this motion on March 13, 2000. (R. ) Petitioner entered his Initial Brief on April 3, 2000 (R. ), arguing: (1) that his habitual offender sentence was illegal under James and Parrish, supra; (2) that the merits of his case have never been ruled on in any prior denials; and (3) that there is no successive motion prescription contained in Fla.R.Crim.P. 3.800(a), and according to Freshman v. State, 730 So.2d 351, 352 (Fla. 4th DCA 1999). The State of Florida noticed the Court on April 6, 2000, that it would not file an answer brief. (R. ) The district court affirmed the lower court's denial on July 14, 2000, and in addition, stated that the motion was time-barred, citing Bover v. State, 732 So.2d 1187 (Fla. 3rd DCA), review granted, 743 So.2d 508 (Fla. 1999), as authority. (R. ) Petitioner filed a motion for rehearing and/or clarification on July 25, 2000 (R. ), noticing the court that there is no authority to time-bar a 3.800(a) motion and their

reliance on Bover stood against this Court's precedent cases. On August 17, 2000, the court denied the motion for rehearing and/or clearification. (R. ) On September 11, 2000, petitioner filed a jurisdiction brief to this Court. (R. ) The State responded with their brief on October 9, 2000. (R. ) This Court entered an order accepting jurisdiction on April 25, 2001 (R. ), where the Bover Court itself, certified that its decision put it in conflict with the Second District's opinion in Judge v. State, 596 So.2d 73 (Fla. 2nd DCA 1991); Bell v. State, 693 So.2d 700 (Fla. 2nd DCA 1997); and Botelho v. State, 691 So.2d 648 (Fla. 2nd DCA 1997), as well as the Fourth District's opinion in Freshman v. State, 730 So.2d 351 (Fla. 4th DCA 1999).

Judge Sorondo dissented in the Bover holding, writing that Judge Bell, Botelho, and Freshman, were all correctly decided. He pointed out that 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). This Court held in Mancino that, "[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

ARGUMENT I:

The First District Court of Appeal erred in time-barring petitioner's Rule 3.800(a) motion where there is no standing precedent to do so. In fact, all standing precedent and authority is well settled as to the fact that a Rule 3.800(a) motion may be filed at any time, even decades after the sentence. State v. Callaway, 658 So.2d 983 (Fla. 1995); Florida Rules of Criminal Procedure, Rule 3.800(a).

ARGUMENT 11:

Improper habitualization is a sentencing error which may be raised pursuant to Rule 3.800(a) when the error is apparent on the face of the record. The Third District Court of Appeal's holding in Bover is error and is based upon a narrow reading of Davis v. State, 661 So.2d 983 (Fla. 1995). Even though Hoppoing v. State, 708 So.2d 26 (Fla. 1998); and State v. Mancino, 714 So.2d 429 (Fla. 1998), both expressly rejected this reading, a habitual sentence may be challenged when a statutory provision of § 775.084 is not complied with, or violated, whenever this error appears on the face of the record.

The Third District Court's conclusion, and the First District Court's reliance on Bover, that habitualization error is not sentencing error and can never be raised pursuant to Rule 3.800(a) conflicts with decisions from every district court of appeal, including the Third and First Districts. Ellis v. State, 703 So.2d 1186 (Fla. 3rd DCA 1997); Valdes v. State, 765 So.2d 774 (Fla. 1st DCA 2000); Oliver v. State,

734 So.2d 1083 (Fla. 1st DCA 1999); 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, 738 So.2d 928 (Fla. 5th DCA 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); Judge v. State, 596 So.2d 73 (Fla. 2nd DCA 1991); Green v. State, 662 So.2d 985 (Fla. 2nd DCA 1995); Botelho v. State, 691 So.2d 648 (Fla. 2nd DCA 1997); Bell v. State, 693 So.2d 700 (Fla. 2nd DCA 1997); Young v. State, 716 So.2d 280 (Fla. 2nd DCA 1998)l accord Ishmael v. State, 735 So.2d 509 (Fla. 2nd DCA 1999). The district court's remaining arguments are based on speculation and legal hypothesis and are unpersuasive.

The decision Boves should be reversed by this Court, and Judge v. State, 596 So.2d 73 (Fla. 2nd DCA 1991); Bell v. State, 693 So.2d 700 (Fla. 2nd DCA 1997); Botelho v. State, 691 So.2d 648 (Fla. 2nd DCA 1997); and Freshman v. State, 730 So.2d 351 (Fla. 4th DCA 1999), should be approved. The Court should further remand petitioner's case for proceedings consistent with Judge and Mancino.

## ARGUMENT I

**THERE IS NO TIME-BAR ON A FLA.R.CRIM.P. RULE 3.800(a) MOTION TO CORRECT AN ILLEGAL SENTENCE.**

A 3.800(a) motion may be raised at any time, even decades after the sentence. State v. Mancino, 714 So.2d 429 (Fla. 1998). The rule itself embodies this principle in the provision that states that: "[a] court may at any time correct an illegal sentence imposed by it." In fact, this principle has been established since 1961. See, § 921.24, Fla. Stat. (1961) (subsequently repealed); In Re Florida Rules of Criminal Procedure, 196 So.2d 124, 171 (Fla. 1967) (adopting precursor to current Florida Rule of Criminal Procedure 3.800(a).

There is no standing precedent, nor authority, to time-bar a 3.800(a) motion. Thus, the district court committed error in dismissing/time-barring petitioner's rule 3.800(a) motion, relying on the Third District Court of Appeal's holding in Bover v. State, 732 So.2d 1187 (Fla. 3rd DCA), review granted, 743 So.2d 508 (Fla. 1999), as its authority.

The district court cannot claim that it treated the 3.800(a) motion as a Rule 3.850 motion, which can be time-barred. See, The Florida Bar Re: Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984); Lambert v. State, 631 So.2d 361 (Fla. 1st DCA 1994), where no explanation to that effect was offered in its opinion. The 3.800(a) motion, denied in the circuit court and appealed to the district court, was not sworn which precludes it from being construed as a 3.850 motion. Linton v. State, 721 So.2d 743 (Fla. 5th DCA

1998).

The district court erred in time-barring petitioner's 3.800(a) motion, and in so doing, violated the very intent of its creation, that is, it may be filed at any time. Mancino, Hopping, supra.

## ARGUMENT II

**HABITDALIZATION UNDER § *775.084*, FLORIDA STATUTES, BASED ON ILLEGAL PREDICATE CONVICTIONS, IS SENTENCING ERROR WHICH MAY BE RAISED BY MOTION PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a).**

The Third District Court ,of Appeal's holding in Bover v. State, 732 So.2d 1187 (Fla. 3d DCA), review granted, *743* So.2d 508 (Fla. 1999), which the First District Court of Appeal relied upon in dismissing/time-barring petitioner's 3.800(a) motion, is clearly erroneous and stands alone against this Court's rulings. The conclusion by the Court in Bover is that improper habitualization can never be raised via a Rule 3.800(a) motion clearly indicates that they made this decision upon a narrow reading of Davis v. State, 661 So.2d 983 (Fla. 1995), which has expressly been rejected by this Court in Hopping v. State, 708 So.2d 263 (Fla. 1998), and Mancino v. State, 714 So.2d 429 (Fla. 1998). The Bover case conflicts, not only with this Court's holding, but also with decisions from every district court of appeal, including the Third District itself. The arguments and reasoning of the district court to support its holdings in Bover are flawed and unpersuasive, and this case must be reversed.

A. Definition Of **"Illegal Sentence" Under Rule 3.800(a):** An "illegal sentence" is a sentence imposed on a defendant that exceeds the statutory maximum and/or a sentence that patently fails to comport with statutory or constitutional limitations. Davis v. State, 661 So.2d 983 (Fla. 1995); Mancino v. State, 714 So.2d 429 (Fla. 1998). 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."

While this rule does not specify the subject of what constitutes an "illegal" sentence, case law has defined various errors that was found to be an "illegal" sentence. Davis (a sentence that exceeds the statutory maximum; Mancino, (a sentence that patently fails to comport with statutory or constitutional limitations); Hopping v. State, 708 So.2d 263 (Fla. 1998) (holding 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 § 775.082); Judge v. State, 596 So.2d 73 (Fla. 2nd DCA 1992) (the judge court considered the kinds of errors which might make a habitual offender sentence, pursuant to § 775.084, illegal. They concluded that procedural defects, such as the failure to personally serve a defendant with a habitualization notice, did not make the sentence illegal. 596 at 77. Where a defendant's **priors** did not actually qualify for habitual offender treatment, however, the sentence would be illegal). Writing for the Second District en banc, Judge Altenbernd defined an "illegal" sentence and 3.800(a) applications:

> "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 designated to re-examine whether the procedure employed to impose the punishment comported with statutory laws and due process. Unlike a motion pursuant to rule 3.850, the motion can be filed without an oath becuase it is designed to test. issues that should not involve significant questions of fact or require a lengthy ev'identiary 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 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 76.

In State v. Callaway, 658 So.2d 983 (Fla. 1995), this Court used the holding in Judge, in part, to determine whether a Hale [1] error could be raised by a 3.800(a) motion. The Court held: (1) "an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regards to the guidelines; and (2) that 3.800(a) motions are limited to those sentencing issues that can be resolved as a matterof law without an evidentiary determination." 658 So.2d 988.

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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.

In Davis v. State, 661 So.2d 983 (Fla. 1995), this Court considered whether a guideline 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: (a sentence to less than the guidelines range without written reasons is not an illegal sentence within the meaning of rule 3.800(a)). The Court concluded in Davis that, "an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regasd to the guidelines."

Because there was an apparent conflict between Gartrell and State v. Whitfield, 487 So.2d 1045 (Fla. 1986), the Court used the "legal maximum" test to resolve the problem, by seceding from dicta in Whitfield to the extent that only if the sentence exceeds the maximum allowed by law would the sentence be illegal. The error in Whitfield was an erroneous scoresheet calculation that the court found was to be addressed under rule 3.800, where the issue in Davis and Gartrell concerned whether a guideline departure sentence unsupported by written reasons was an illegal sentence.

Some courts have interpreted Davis and Callaway as making the statutory maximum in Chapter 775, otherwise known as prototype "illegal sentence," Bain v. State, 730 So.2d 296 (Fla. 2nd DCA 1999), as the test to define a "illegal sentence." Bover is one example. Another is Speights v. State, 711 So.2d 167 (Fla. 1st DCA 1998), quashed and remanded, 749 So.2d 503 (Fla. 1999). Speights was improperly habitualized and received

a 22 year sentence. The district court reasoned that even though the offense of attempted carjacking was not a statutory authorized predicate offense for habitualization, the sentence was not "illegal" because it did not exceed the statutory maximum after habitualization. The district court certified a question to this Court in this case. The State conceded error during oral argument and pursuant to that concession, this Court ordered the trial court to correct the sentence immediately. See, Maddox v. State, 760 So.2d 89 (Fla. 2000). However, this Court's decisions in Hopping v. State, 708 So.2d 263 (Fla. 1998); and Mancino v. State, 714 So.2d 429 (Fla. 1998), have rejected the reading of Davis and Callaway that construed those cases as making the compliance with the statutory maximum in Chapter 775, a litmus test for illegal sentences. In Mancino, this Court wrote:

> As is evident from our recent holding in Hopping, we have rejected the contension that our holding in Davis mandates that only those sentences that facially exceed the statutory maximus 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, [650 So.2d 1087 (Fla. 3rd DCA 1995)], 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."

714 So.2d at 433.

Mancino and Hopping, along with Callaway, have not only defined an "illegal" sentence, but also set requirements that must be met in order to raise the claim pursuant to rule 3.800(a):

1. The error must have resulted in an illegal sentence;

2. The error must appear on the face of the record;

3. The motion must affirmatively allege that "the court records demonstrate on their face an entitlement to relief."

B. **Improper** Enhancement **Under** *775.084,* **Florida Statutes, Is A Viable** Claim For **Illegal** Sentence **And May Be Raised** By Rule **3.800(a).**

When a court imposes an enhanced sentence in violation of the substantive requirements of § *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 statutory precluded out-of-state convictions as predicate offenses, as in petitioner's case, the sentence patently fails to conform with statutory limitations and is by definition illegal. Hopping, Mancino. So long as the record reflects the alleged error and can be determined without an evidentiary hearing, the error can be raised by a 3.800(a) motion.

All the district courts, in light of Mancino, have concluded that improper habitualization in violation of § 775.084, renders a sentence illegal. 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 § 775.084, out-of-state convictions could not be used as the basis for habitual offender sentencing. See, § 775.084, Fla. Stat. (1989). The Fourth District reversed, holding that a failure to comport with the statutory requirements of the habitual offender statute is an illegal sentence. 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), 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 § 775.084 resulted in illegal sentence).

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. 2nd DCA 1998); accord Ishmael v. State, 735 So.2d 509 (Fla. 2nd DCA 1999); see als, Bain v. State, 730 So.2d 296 (Fla. 2nd DCA 1999) (en banc).

In this case, the First District Court of Appeal, in relying on the Third District's holding in Bover, ignored this Court's holdings 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 but must be brought by 3.850 motion within the time limits established by Florida Rules of Criminal Procedure. It is clear that the Third District ruled on Bover under Davis and the "prototype 'illegal sentence'" definition, which this Court expressly rejected in Hopping and Mancino. These has been no explanation forthcoming why the First and Third Districts considered themselves at liberty to employ a definition of illegal sentence against this Court's precedent cases, or why they ruled against their own holdings in Ellis v. State, 703 So.2d 1186 (Fla. 3rd DCA 1997); Oliver v. State, 734 So.2d 1083 (Fla. 1st DCA 1999); and Valdez v. State, 765 So.2d 774 (Fla. 1st DCA 2000).

**C. The Third District Court Of Appeal's Holding In Bover Failed To Support Its Ruling That Habitualization Error Is Not Subject To 3.800(a) Proceedings.**

The Court in Bover raised a number of arguments to support its conclusion that habitualization error can never be raised pursuant to rule 3.800(a), based on speculation and legal hypothesis that even arguments, are true, still does not preclude 3.800(a) application to sentencing errors based upon habitualization.

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 § *775.084,* can be divided into two steps, in no way implies that only the second step is "sentencing" for purposes of Rule 3.800(a). The district court cites no authority for its conclusion.

The fact that a defendant could have raised an illegal habitual offender sentence pursuant to Rule 3.850 motion is irrelevant to the question of whether it may be raised pursuant to Rule 3.800(a). In support of its holding in Bover, the district court determined that, basically, the defendant's claim boiled down to an ineffective assistance of counsel where counsel failed to discover that the predicate convictions did not satisfy the sequential conviction rule. The court called this error a "classic claim" for relief under Rule 3.850. It is well settled that where counsel fails to object to an illegal sentence this error 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. 3rd DCA 1998). However, this fact in no way implies that such an illegal sentence may not also be raised under Rule 3.800(a). Rule 3.850 can be used to raise jail-credit issues but this does not prevent the same issue being raised on 3.800(a). Mancino, quoting Chojnowski v. State, 705 So.2d 915, 917-19 (Fla. 2nd DCA).

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. This can only be because the court misapprehends the logic of Judge. Judge's explanation of how the Rule 3.800(a) line is drawn is clear:

> Rule 3.800(a) is intended to provide relief for a narrow category of cases 2/ 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 lenghty 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), In Re Florida Rule of Criminal Procedure, 196 So.2d

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2/ As to the "narrow category of cases" language in the Judge decision, this Court has found that the class of errors that constitute an "illegal" sentence that can be raised for the first time in a postconviction motion decades after a sentence becomes final is a narrower class of errors than those termed "fundamental" erros that can be raised on direct appeal even though unpreserved. Maddox v. State, 760 So.2d 89 (Fla. 2000), footnote 8, at 100.

124, 171 (Fla. 1967) (adopting precursor to current Florida Rule of Criminal Procedure 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 are found on the face of the record precluding a lengthy evidentiary inquiry.

The district court mentioned Mancino only once in Bover, and that 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." This statement seems to indicate that the Third District disagrees with the holding of Mancino, where it expressly rejected the narrow reading of Davis, and where the district court employed a definition of illegal sentence contrary to this Court's holding in Mancino.

The district court's holding that habitualization can never be raised pursuant to Rule 3.800(a) indicates a total disregard of the seriousness this issue entails and the consequences to defendants. In Maddox v. State, 760 So.2d 89 (Fla. 2000), in addressing the issue in Speights v. State, 749 So.2d 167 (Fla. 1999), this Court stated:

> "Improper habitualization of defendant contrary to specific statutory requirements is a 'patent,' 'serious' error that has a qualifiable effect on the length of the defendant's incarceration and, thus, is 'fundamental error' ..."

While the above statement was made in context of a direct appeal application, the principle of improper habitualization error *is* and has been addressed in 3.800(a) motions. Speights' case is a graphic demonstration of the consequences to the defendant of improper habitualization where the defendant's guideline sentence was six years and two months, and statutory maximum, without habitualization, was fifteen years. Because the defendant was improperly habitualized, he received a twenty-two (22) year sentence. This Court quashed the sentence imposed and remanded for a correct sentence immediately. Habitualization errors like those raised by petitioner and Bover, satisfy the requirements of Rule 3.800(a), and therefore, may be corrected.

The possibility that some habitualization issues may fall outside Rule 3.800(a) does not mean that this is true in all cases. In Bover, the district court conceded that most motions challenging the viability of predicate offenses for habitualiaation can be resolved on the face of the record, but that other claims might require an evidentiasy inquiry, implying that this made Rule 3.800(a) inappropriate for all habitualization. This does not imply that habitualization errors, apparent on the face of the record, cannot be raised under Rule 3.800(a). This Court dealt with a similar 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 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 under Rule 3.800(a), no matter how obvious that error may be. The First District Court of Appeal adopted this same holding when they used this holding in Bover as the authority for dismissing/time-barring petitioner's 3.800(a) motion. To reach this conclusion, the Court in Bover 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). The district court's conclusion puts Bover in conflict with decisions from every district court of appeal. This Court should reverse Bover and remand this case back to the First District Court of Appeal for proceedings consistent with Mancino, Hopping, Judge, and Freshman, supra.

Respectfully submitted,

Eduardo Valenzuela, 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 was furnished by U.S. Mail to: James W. Rogers, Senior Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 17 day of May, 2001.

Eduardo Valenzuela

Eduardo Valenzuela, pro se

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

EDUARDO VALENZUELA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 1D00-0816



Opinion filed July 14, 2000.

An appeal from the Circuit Court for Alachua County. Judge Larry G. Turner.

Eduardo Valenzuela, pro se, for Appellant,

Robert A. Butterworth, Attorney General, and James W. Rogers, Assistant Attorney General, Tallahassee, for Appellee.

BARFIELD, C. J.

AFFIRMED. The motion was time-barred. See Bover v. State, 732 So. 2d 1187 (Fla. 3d DCA), review sranted, 743 So. 2d 508 (Fla. 1999); Torres v. State, 751 So. 2d 701 (Fla. 3d DCA 2000).

KAHN and DAVIS, JJ., CONCUR.

**DISTRICT COURT OF APPEAL, FIRST DISTRICT**
**Tallahassee, Florida 32399-1850**
**Telephone No. (850) 488-6151**

August 17,2000

**CASE NO.: IDOO-816**
L.T. No.: 89-4572-CFA

Eduardo Valenzuela v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

**BY ORDER OF THE COURT:**

Appellant's motion filed July *27,* 2000, for rehearing and/or clarification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Eduardo L. Valenzuela James W. Rogers, A.A.G. Hon. Robert A. Butterworth

jm

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA