ORIGINAL

IN THE SUPREME COURT OF FLORIDA

EDUARDO VALENZUELA,
Petitioner,

V.

STATE OF FLORIDA,
Respondent.

CASE NO. SC00-1843

REPLY BRIEF

EDUARDO VALENZUELA, pro se
BAKER CORRECTIONAL INSTITUTION
POST OFFICE BOX 500
SANDERSON, FLORIDA 32087-0500

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

OTHER

SUMMARY OF RESPONCE TO ANSWER BRIEF OF RESPONDENT

THIS COURT PROPERLY GRANTED REVIEW IN THIS CASE WHERE THE FIRST DISTRICT COURT OF APPEAL'S TIME-BAR OF 3.800(a) MOTION WAS BASED SOLELY ON THE HOLDING OF THE THIRD DISTRICT COURT OF APPEAL IN BOVER.

RESPONCE

Petitioner takes exception to Respondent's "rejection" of the facts and facts as set forth in Petitioner's Brief on the Merits. The relevant facts of this case, in respect to the grounds this Honorable Court Found to merit Review, does not

concern the circuit court order. Review was granted based on the district court's reliance on Bover v. State, 732 So.2d 1187 (Fla. 3d DCA), review granted, 743 So.2d 508 (Fla. 1999) in affirming/time-barring Petitioner's appeal of a 3.800(a) motion which alleged an illegal sentence base on an illegal imposition of the habitual offender statute. The district court clearly used Bover and its prodigy, Torres v. State, 751 So.2d 701 (Fla. 3d DCA 2000), to affirm/time-bar Petitioner's motion based on the holding in Bover, i.e., that habitual offender sentences cannot be challenged under rule 3.800(a) motion to

correct illegal sentence. Bover created conflict with decisions reflecting the correct rule of law, thus this Honorable Court has expressed concern in the precedential effect of those decisions that are incorrect. Wainwright v. Taylor, 476 So.2d 669 (Fla. 1985). This Honorable Court has recently rejected the reasoning in Bover, that would preclude a finding of an illegal sentence under 3.800(a) because habitualization occurred in the first step of the process. Carter v. State, 26 Fla. L. Weekly S347 (May 25, 2006). In Carter this Court held that a habitual offender sentence, which is solely a creature of statute, is illegal where the habitual

offender statute in effect at the time of the offense prohibited the imposition of a habitual offender sentence. Id at 5349. Since the Bover decision was an express and direct conflict between decisions and appeared within the four corners of the majority decision, Reaves v. State, 485 So.2d 829, 830 (Fla. 1986), and since the district Court relied upon Bover exclusively in affirming/time barring Petitioner's 3.800(a) motion, this amounts to prima facie showing that review in this Honorable Court was properly granted. Further, the Respondent had the entire record on appeal, which included the denials of past motions,

but did not file an appellant brief to the district court below. (R-). Even at the time the Respondent filed it's Jurisdictional Brief of October 9, 2000, (R-), they freely conceded that the district court below relied on Bover in affirming/time barring Petitioner's motion and went on to say that this Court should grant review. Further evidence that Petitioner's 3.800(a) motion was affirmed/time-barred based on Bover is found in the abscence of any other authority used by the district court below. (R-). The court did not "per curiam affirm" Petitioner's denial and did not use any of the cases cited by

the circuit court in it's denial, including successive 3.800(a) motions, in the denial. The district court is well aware of the case law concerning "successive" motions. The reason they did not use these cases may have been because after reviewing Petitioner's 3.800(a) motion filed in the circuit court, they noted that Petitioner explicitly argued that he had filed the motion under State v. Mancino, 714 So.2d 429 (Fla. 1998), which rejected the contention in Davis v. State, 661 So.2d 1193 (Fla. 1995), that only those sentences that facially exceed the statutory maximums may

be challenged under rule 3.800(a) as illegal. (R-13). To support this allegation, Petitioner respectfully directs this Court's attention to Valdez v. State, 765 So.2d 774 (Fla. 1st DCA 2000), decided by the district court below just a few weeks before Petitioner's case was decided. In that case, Valdez had raised the same issue of an illegal sentence by prior 3.800(a) and 3.850 motions. The district court, on a second 3.850 motion, treated the motion as a 3.800(a) and granted relief under Mancino which included sentencing errors resulting from a failure to adhere to statutory or constitutional requirements. Thus, for Respondent to now claim that part

of the reason the district court denied Petitioner's motion was based on "sucessive" filing is not supported by fact, case law, or in the order of denial in the case at bar. There have been other cases where a defendant has filed a 3.800(a) motion and been denied under Davis, and yet file the same motion after Mancino and obtain relief. See, Freshman v. State, 730 So.2d 351 (Fla. 4th DCA 1999).

It should also be noted that the district court below used Bover to time-bar Petitioner instead of using the circuit court's reason for denial. By using Bover the district court did not have to find

that Petitioner's claim was "conclusively refuted by the record", where there were no record excerpts attached to the circuit court's order of denial, in the instant case, nor in past denials. Rule 9.141 (b)(1)(D) Fla. R. App. P. (2001); McClendon v. State, 603 So.2d 607 (Fla. 1st DCA 1992); Roberts v. State, 678 So.2d 1232, 1236 (Fla. 1996); Long v. State, 678 So.2d 925 (Fla. 1st DCA 1996); Bell v. State, 589 So.2d 1374 (Fla. 1st DCA 1991); Scott v. State, 622 So.2d 550 (Fla. 2d DCA 1993).

Petitioner strongly disagrees with Respondent's closing sentence of their argument where it is alleged that, "This Court's decision in Bover may be relevant

but it will not be controlling on the facts." The district court used the holding in Bover to time-bar Petitioner's 3.800(a) motion without even considering the merits of the case because it involved an habitual offender sentence. Obviously the district court agreed with the Third District Court of Appeal's holding that habitual offender sentences cannot be brought under 3.800(a) motions. This Court in Carter, supra, expressly disagreed with that holding and held that a habitual offender sentence is illegal where the habitual offender statute in effect at the time of the offense prohibited the imposition of a habitual

offender sentence. Since this is the exact argument brought forth in Petitioner's 3.800(a) motion in the district court below, and since Bover was the authority used by that court to time-bar the 3.800(a) motion, then the only conclussion Petitioner can come to is that the decision in Bover must be controlling in this case.

Finally, Petitioner would point out that Respondent's Answer Brief appears to have been untimely filed. Petitioner timely filed his Brief on the Merits with a service date of May 17, 2001, where the Respondent's Answer Brief has a service date of June 11, 2001, that appears to exceed the time limitation set forth

in Rule 9.210(f) and Rule 9.420(e), Florida Rules of Court (2001). Petitioner will not try to make an issue on this point, but leaves it to this Honorable Court's discretion pursuant to Rule 9.410, Florida Rules of Court (2001).

CONCLUSION

Petitioner has shown that review in this case was correctly granted and that the decision in Bover would be controlling where the district court below relied on that holding to affirm/time-bar appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was Furnished by institutional and U.S. Mail to: James W. Rogers, Senior Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 24TH day of June, 2001.

Respectfully submitted and served,

Eduardo Valenzuela

EDUARDO VALENZUELA, pro se
Baker Correctional Institution
Post office Box 500
Sanderson, Florida 32087-0500