IN THE FLORIDA SUPREME COURT

JOHN EARL HUBBARD,

Petitioner,

v. CASE NO.: SC00-2350

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

RULES:

PREFACE

In this brief the Petitioner JOHN EARL HUBBARD will be referred to as "Mr. HUBBARD." The Respondent, the State of Florida, will be referred to as "the State."

Citations to the record will be referred to by document title followed by the appendix number, if applicable, and page number where the reference can be found.

STATEMENT OF THE CASE AND FACTS

On June 19, 1989 the State arraigned Mr. HUBBARD on two charges of burglary and attempted sexual battery. (State's Jurisdictional Brief, Exhibit 2, attached exhibit c). The burglary complaint alleged that on May 15, 1989 at 11:00 a.m. defendant did "unlawfully assault C.S.A., St. Petersburg, with a deadly weapon, to wit: Approx. 16" kitchen knife - 12" steel blade with 4" dark wood handle, a better description of which to the State Attorney is unknown, by holding the knife with his right hand in front of his person and pointing it at C.S.A. while stating: 'If you run or scream, I'm going stab you or I'll cut your throat.'" (State's Jurisdictional Brief, Exhibit 2, attached exhibit a). The attempted sexual battery complaint alleged that on May 15, 1989 at 11:00 a.m. at defendant did "attempt to assault one, C. S.A., with intent to commit sexual battery upon the said A. without her consent. Hubbard, while pointing a 16" knife at A., stated: 'All I want is some pussy' 'If you run or scream, I'm going stab you or I'll cut your throat.' The victim, A., was able to escape before the sex. battery was completed." (State's Jurisdictional Brief, Exhibit 2, attached exhibit b).

On June 13, 1990, a jury convicted Mr. HUBBARD of the lesser included offense of burglary of a dwelling and the charged attempted sexual battery. The trial court sentenced Mr. HUBBARD to forty years for the attempted sexual battery and ten years for burglary of a dwelling. The Second District Court of Appeal reversed the 40-year sentence as exceeding the statutory maximum. *Hubbard v. State*, 582 So. 2d 824, 824 (Fla. 2d DCA 1991). Upon remand, the trial court sentenced Mr. HUBBARD to thirty years for the attempted sexual battery and ten years as a habitual violent felony offender for the burglary of a dwelling. *Hubbard v. State*, 773 So. 2d 87, 88 (Fla. 2d DCA 2000). The sentences were to run consecutively. *Hubbard v. State*, 773 So. 2d 87, 88 (Fla. 2d DCA 2000).

On May 19, 1999 Mr. HUBBARD filed an amended motion to correct illegal sentence requesting relief under Florida Rules of Criminal Procedure 3.800 and 3.850. (State's Jurisdictional Brief, Exhibit 2, p. 1). Mr. HUBBARD alleged in Count 2 of the amended motion that his consecutive habitual violent felony sentences were illegal under *Hale v. State*, 630 So. 2d 521 (Fla. 1993). (State's Jurisdictional Brief, Exhibit 2, pp. 9-11).

On April 10, 2000 the trial court denied Mr. HUBBARD's amended motion. The trial court held regarding the *Hale* error that:

> This allegation must be raised in a Rule 3.850 motion, because 'whether a prisoner's consecutive sentences arise out of a criminal episode is not a pure question of law.' Callaway v. State, 642 So. 2d [636] (Fla. 2d DCA 1994). The Court cannot treat Defendant's Motion as a Rule 3.850 motion, as it is untimely under the rule. It is therefore ORDERED AND ADJUDGED that Defendant's Motion is hereby DENIED.

(State's Jurisdictional Brief, Exhibit 3, pp. 1-2). The trial court's order was rendered April 11, 2000. (State's Jurisdictional Brief, Exhibit 3, p. 1).

Mr. HUBBARD timely filed a motion for rehearing on April 17, 2000. (State's Jurisdictional Brief, Exhibit 4). The trial court denied the motion for rehearing on April 27, 2000. (State's Jurisdictional Brief, Exhibit 5).

Mr. HUBBARD timely sent a notice of appeal on May 13, 2000 which notice was filed by the Clerk on May 30, 2000. (State's Jurisdictional Brief, Exhibit 6).

On September 6, 2000 a panel of the Second District denied Mr. HUBBARD's appeal with a written opinion. Mr. HUBBARD filed a motion for rehearing with the Second District, which motion that Court denied. (Jurisdictional Brief of Respondent, p. 2). On November 22, 2000 the State filed its jurisdictional brief stating that Mr. HUBBARD had timely filed his notice to invoke the discretionary jurisdiction of this Court and acknowledging a conflict in the decisions issued by the Second District and First District. (Jurisdictional Brief of Respondent, p. 2). On

December 7, 2000, Mr. HUBBARD filed an amended jurisdictional brief with this Court. (Petitioner's Amended Jurisdictional Brief).

This Court accepted jurisdiction by Order dated June 13, 2001.

STATEMENT OF JURISDICTION

This Court has jurisdiction in this case under Article V, § 3(b)(3), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

This appeal is before the Court upon a conflict between district courts of appeal. This Court should resolve the conflict by holding that a claim of illegal consecutive habitual offender sentences, also described as a *Hale* claim, can be corrected by a Florida Rule of Criminal Procedure 3.800(a) motion if the necessary facts can be determined from the face of the record.

This Court's recent ruling in *Carter v. State*, 26 Fla. L. Weekly S347, 2001 WL 543657 (Fla. May 24, 2001) is the basis for resolving the conflict between district courts. In *Carter* this Court clarified that it did not intend to preclude review of *Hale* claims by Rule 3.800 motion in its *Callaway v. State*, 658 So. 2d 983 (Fla. 1995) decision. The Second District's reliance upon *Callaway* is therefore misplaced.

In *Carter* this Court also essentially defined an illegal sentence on post-conviction review as an impossible sentence which no judge could impose. There is no reason why, in principle, that determination could not be made for a *Hale* violation from the record on a 3.800 motion. The record on this appeal supports that Mr. HUBBARD's sentence qualifies as a *Hale* violation and Mr. HUBBARD is entitled to relief. Assuming *arguendo* that

insufficient record evidence exists to determine a *Hale* violation, then the case should be remanded for such determination.

ARGUMENT

The conflict issue is whether correction of consecutive habitual offender sentences ("a *Hale* claim") is allowed under Florida Rule of Criminal Procedure 3.800(a) if the necessary facts can be determined from the face of the record.

The resolution of the conflict is contained in this Court's recent decision in *Carter v. State*, 26 Fla. L. Weekly S347, 2001 WL 543657 (Fla. May 24, 2001).

Standard of Review.

The standard of review for a challenge to a procedural bar is *de novo*. *West v. State*, 2001 WL 726004, *1 (Fla. 5th DCA June 29, 2001) (citing *Bain v. State*, 730 So. 2d 296 (Fla. 2d DCA 1999)). The Second District procedurally barred Mr. HUBBARD's motion as improper under Rule 3.800. *Hubbard v. State*, 773 So. 2d 87, 88 (Fla. 2d DCA 2000).

Issue 1: *Hale* Claims Appearing On The Face Of The Record May Be Reviewed By A Rule 3.800 Motion.

In this appeal, both the circuit court and the panel writing for the Second District held a *Hale* claim is a mixed question of law and fact that is cognizable only by a Florida Rule of Criminal Procedure 3.850 motion. *Hubbard v. State*, 773 So. 2d 87, 88 (Fla.

2d DCA 2000); *Order Denying Motion To Correct Illegal Sentence*, State v. Hubbard, Sixth Judicial Circuit of Fla., Case No. CRC 89-7570-CFANO, April 10, 2000) (contained in State's Jurisdictional Brief, Exhibit 3, pp. 1-2). Both the circuit court and Second District panel cite to the Second District's opinion in *Callaway v. State*, 642 So. 2d 636, 640 (Fla. 2d DCA 1994) as legal authority. *Hubbard v. State*, 773 So. 2d 87, 88 (Fla. 2d DCA 2000); *Order Denying Motion To Correct Illegal Sentence*, State v. Hubbard, Sixth Judicial Circuit of Fla., Case No. CRC 89-7570-CFANO, April 10, 2000) (contained in State's Jurisdictional Brief, Exhibit 3, p. 1). The Second District's opinion in *Callaway* was later affirmed by this Court on a different basis in *Callaway v. State*, 658 So. 2d 983 (Fla. 1995).

The Second District panel decision in *Hubbard* conflicts with the First and Fifth Districts. *E.g.*, *West v. State*, 2001 WL 726004 (Fla. 5th DCA June 29, 2001); *Valdes v. State*, 765 So. 2d 774 (Fla. 1st DCA 2000). The Second District panel decision in *Hubbard* also conflicts with other panel decisions from the Second District. *E.g.*, *Davis v. State*, 784 So. 2d 1205 (Fla. 2d DCA 2001); *Adams v. State*, 755 So. 2d 678, 679 (Fla. 2d DCA 1999). Both the First and Fifth Districts cite the Second District's decision in *Adams* as support for their holdings that *Hale* claims

appearing on the face of the record may be reviewed under Rule 3.800(a). *West v. State*, 2001 WL 726004, *1 (Fla. 5th DCA June 29, 2001); *Valdes v. State*, 765 So. 2d 774, 776 (Fla. 1st DCA 2000).

Nevertheless, this Court's recent decision in *Carter v. State,* 26 Fla. L. Weekly S347, 2001 WL 543657 (Fla. May 24, 2001) is the controlling decision that resolves the conflict between district courts. First, this Court clarified that its holding in *Callaway* did not categorically preclude review of *Hale* claims by Rule 3.800 motion: "In rejecting the argument that the sentence was illegal, our decision turned not on our definition of 'illegal sentence,' but on the fact that the error at issue was not patent from the record." *Carter v. State,* 26 Fla. L. Weekly S347, 2001 WL 543657, *3 (Fla. May 24, 2001). The Second District panel's reliance upon *Callaway*, therefore, is misplaced.

Second, Mr. HUBBARD's appeal is identical to the *Carter* decision in all relevant aspects. In *Carter*, the defendant received a habitual offender sentence for a life felony, even though the habitual offender statute in existence did not provide for enhancement for a life felony. *Carter v. State,* 26 Fla. L. Weekly S347, 2001 WL 543657, *1 (Fla. May 24, 2001). This Court approved a working definition of an illegal sentence as one that

"imposes a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." *Carter v. State,* 26 Fla. L. Weekly S347, 2001 WL 543657, *7 (Fla. May 24, 2001). This Court then held defendant Carter's sentence was illegal because no judge could have imposed a habitual offender life felony under the then-existing statutes. *Carter v. State,* 26 Fla. L. Weekly S347, 2001 WL 543657, *7 (Fla. May 24, 2001).

So too here, this Court has already held that nothing in the habitual offender statutes permitted both habitual offender enhancement and imposition of consecutive sentences for offenses arising out of a single criminal episode. *Hale v. State*, 630 So. 2d 521, 524-25 (Fla. 1994). Like *Carter*, no judge could have sentenced Mr. HUBBARD to both enhanced terms of incarceration as a habitual offender and structured consecutive sentences when the offenses arose out of a single criminal episode.

Under *Carter*, a Rule 3.800 illegal sentence is essentially an impossible sentence *a priori*. There is no need to take new evidence as in a Rule 3.850 motion. Like direct appeal, there exists no principled reason why an impossible, hence illegal, sentence cannot be determined *a priori* relying solely on the 3.800 record. Mr. HUBBARD's original sentence of forty years for attempted sexual battery was an impossible/illegal sentence

because it the exceeded statutory maximum. A *Hale* violation is an equally impossible sentence if it arises from a single criminal episode. No reason exists why *Hale* violations should be categorically precluded from identification by record evidence. The First and Fifth Districts have not experienced problems identifying when *Hale* violations are plain from the record on 3.800 motions. *E.g.*, *West v. State*, 2001 WL 726004 (Fla. 5th DCA June 29, 2001); *Valdes v. State*, 765 So. 2d 774 (Fla. 1st DCA 2000). Mr. HUBBARD's motion for relief under 3.800(a) states a cause for relief on the record and should not be categorically precluded under the reasoning of *Carter*.

It is plain from the record on appeal that both Mr. HUBBARD's offenses arose from the same episode. The charging complaints state the same date, the same time, the same address, the same victim, the same weapon, and the same reported threats. Mr. HUBBARD is entitled to a ruling from this Court that his Rule 3.800 motion should be granted.

Assuming *arguendo* that the record information contained in the appeal is considered insufficient to establish that the events arose in a single episode, then the matter should be remanded to the trial court with instructions to allow Mr. HUBBARD to amend the record with already existing record evidence proving all events emanated from a single episode. The basis for the trial

court ruling and the Second District decision was that Rule 3.800 precludes a *Hale* claim like the one Mr. HUBBARD raises. Since it is possible to proceed on a Rule 3.800 motion if there is sufficient evidence on the face of the record based on the reasoning in *Carter*, then it is appropriate to permit Mr. HUBBARD his day in court with that evidence.

CONCLUSION

This Court should quash the decision of the Second District and remand with instructions to either grant Mr. HUBBARD's Rule 3.800 motion or require the trial court to make the necessary determination whether the facts supporting the 3.800 motion appear on the face of the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of Petitioner's Amended Initial Brief was sent to ROBERT J. KRAUSS, ESQ., Senior Asst. Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, FL, 33607-2367, and RONALD NAPOLITANO, ESQ., Asst. Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, FL, 33607-2367, by U.S. Mail this 18th day of July 2001.

CERTIFICATE REGARDING TYPE

I CERTIFY that the size and style of type used in this brief is 12-point Courier New.

_____
R. MITCHELL PRUGH, ESQ.