ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JOHN EARL HUBBARD,

Petitioner,

v. CASE No. SC00-2350

STATE OF FLORIDA,

Respondent.
/

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

/s/ John Earl Hubbard
JOHN EARL HUBBARD
POLK CORRECTIONAL INSTITUTION
10800 EVANS ROAD
POLK CITY, FLORIDA 33868-6944

Petitioner pro se

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STATEMENT OF THE CASE AND FACTS

The State charged Appellant by information with count 1Burglaryof a dwelling and count 2, attempted sexual battery. These crimes occurred during a single episode and upon a single victim. Upon conviction Appellant was sentenced on both counts as a violent habitual felony offender to run consecutively to the other.

Subsequently, the Florida Supreme Court in **Hale v. State, 630 So.2d 521 (Fla. 1993)**, declared the imposition of consecutive sentences for offenses arising out of a single criminal episode, to be unconstitutional.

Petitioner filed a Rule **3.800(a)** motion challenging his illegal Hale sentence in the trial court below. The trial court eventually, denied the motion holding that the Hale claim should have been raised in a **Rule 3.850** motion, and therefore, was untimely.

The Second District Court of Appeal affirmed with an opinion. This petition follows.

SUMMARY OF THE ARGUMENT

In this case, the District Court of Appeal held that an illegal sentence under **Hale v. State, 630 So.2d 521 (Fla. 1993)**, are not actionable by a **Rule 3.800 motion**. The decision of the District court cannot be reconciled with the previous decisions of this Court in **Mancino v. State, 714 So.2d 429 (Fla. 1998)**, and the decision of the First District in **Valdes v. State, 25 FLW D1611(d)(July 6, 2000)**, wherein the Court interpreted an "illegal" sentences as a sentence that patently fails to comport with 'statutory or constitutional limitations,' actionable in a 3.800 motion. Thus, Petitioner contends that the decision of the second District court expressly and directly conflicts with a previous decision of this and other District courts.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District court of appeal on the same point of law. **Art. V Section (3)(b)(3), Fla. Const. (1999); Fla.R.App.P. 9.030(a)(2)(A)(iv).**

ARGUMENT

The decision of the District Court of Appeal in this case Expressly and Directly conflicts with the decision of this Court in **Mancino v. State, 714 So.2d 429 (Fla. 1998)**, and the decision of the First District in **Valdes v. State, 25 FLW D1611(d)(July 6, 2000)**.

The district court of appeal held that **Hale** claims are not appropriate for consideration by a **Rule 3.800 motion**. As explained below, the decision of the district court conflicts with a decision of this Court holding that **"illegal sentence issues are cognizable in a rule 3.800 motion when the record affirmatively demonstrate on its face an entitlement to relief."** The Petitioner respectfully submits that this court should grant discretionary review and resolve the conflict by squashing the decision of the district court.

In the decision of **Valdes v. State, 25 FLA D1611 (1St DCA 2000)**, the court's refused to address an illegal Sentence claim under **Hale**, by a rule **3.800(a)** motion. The District Court reversed and remanded the trial court to address the 3.800 motion:

> **"It is true as a general proposition that a Hale claim must be presented in a timely motion under rule 3.850 and not in a motion under rule 3.800(a). The supreme court reasoned in Callaway that Hale claims are not suited for resolution in rule 3.800(a) motions, because the question whether the offenses arose out of a single criminal episode**

> **usually turns on the facts. However, we do not read the Callaway decision to preclude consideration of a Hale claim under rule 3.800(a) in a case in which the illegality of the sentences can be proven on the face of the record. The court observed in Callaway, that the facts necessary to support a Hale claim "often cannot be determined from the face of the record," which is not to say that a Hale claim can be proven by facts appearing on the face of the record. Callaway at 988.**
>
> **The second District Court of Appeal has recognized that a defendant may be entitle to assert a Hale claim under rule 3.800(a) if the facts supporting the claim are apparent from the face of the record. In Adams v. State, 24 Fla. L. Weekly D1567(Fla. 2d DCA 1999), the court acknowledged that the Callaway decision does not "irretrievably foreclose relief from consecutively imposed habitual offended sentences growing out of the same criminal episode by means of rule 3,800." See also Richardson v. State, 698 So.2d 551(Fla. 1st DCA 1997)(Allen J., dissenting). As the state conceded in Adams, a defendant may properly assert a Hale claim in a rule 3.800(a) motion if the claim is one the court can resolve without resorting to extra-record facts.**

Id. at D1612. {Emphasis added}.

Thus, the district court has "expressly" held that an illegal sentence claim under **Hale v. State**, can be raised in a Rule **3.800(a)** motion.

The District court's decision is in direct conflict with the decision of this Court in **Mancino v. State, 714 So.2d 429 (Fla. 1998)**, wherein the Court redefined the definition of an illegal sentence and extended its application in a rule 3.800 motions to correct an illegal sentence. The Court expressly stated:

> **As is evident from our recent holding in Hopping, we have rejected the contention that our holding in Davis mandates that only those sentences that facially exceed the statutory maximums 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 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". As noted by the Fourth District in Sullivan, a prisoner who can demonstrate her entitlement to release when properly credited with time served would be entitled to relief by habeas corpus."**

Id., at 433 {Emphasis added}.

The decision of the district court in this case is in direct conflict with the decision of this Court in **Mancino**, the First district in **Valdes**, and its own decision in **Adams**, to the extent that it allows illegal sentences that patently fails to comport with statutory or constitutional limitations to be raised in a Rule 3.800(a) motion. The district court correctly interpreted this Court's holding in **Mancino v. State**, and the court should now reaffirm that holding by accepting discretionary review and quashing the contrary decision of the District court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of Petitioner's argument.

Respectfully submitted,

/s/ John Earl Hubbard

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Jurisdictional Brief has been furnished to Attorney Generals Office, Tampa Regional Office Criminal Appeals, 2002 N. Lois Avenue, 7th Floor, Tampa, Florida 33607 by U.S. Mail this 7 day of **December 2000**.

/s/ John Earl Hubbard

JOHN EARL HUBBARD

Petitioner, pro se

Office of the Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida

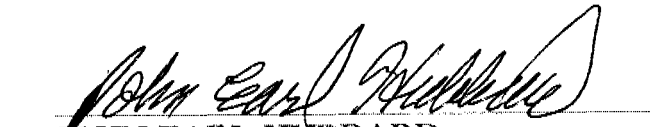
FILED
THOMAS D. HALL
DEC 11 2000
CLERK, SUPREME COURT
BY_____

DECEMBER 7, 2000

Re: **Hubbard v. Florida**, Case No: SC00-2350

The Honorable Clerk:

Please find enclosed the Original and five copies of the Amended Brief on Jurisdiction, by acknowledgement and communication of the Court dated December 4, 2000, and received by Petitioner on December 6, 2000.



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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHN EARL HUBBARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D00-2403

Opinion filed September 6, 2000.

Appeal pursuant to Fla. R. App. P. 9.140(i) from the Circuit Court for Pinellas County; Richard A. Luce, Judge.

PER CURIAM.

John Earl Hubbard appeals the trial court's order denying his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800. We affirm.

On June 13, 1990, a jury convicted Hubbard of burglary of a dwelling (count I) and attempted sexual battery (count II) for actions which occurred on May 15, 1989. Pursuant to sections 775.084(1)(b) and (4)(a), Florida Statutes (Supp. 1988), the trial court sentenced Hubbard to ten years as a habitual violent felony offender on

count I and thirty years as a habitual violent felony offender with a minimum mandatory of ten years on count II.[1] The sentences were to run consecutively.

Hubbard filed his motion to correct illegal sentence on May 19, 1999. Hubbard argued that (1) his sentences were illegal because they were imposed consecutively for crimes arising out of a single episode, and (2) the sentences were illegal because they were imposed pursuant to an unconstitutional statute. In his first issue on appeal, Hubbard argues that his consecutive habitual violent felony offender sentences are illegal under Hale v. State, 630 So. 2d 521, 524-25 (Fla. 1993), which held that consecutive habitual offender sentences could not be imposed for multiple crimes committed during a single episode. However, this claim is a mixed question of law and fact and must be addressed by a motion filed pursuant to Florida Rule of Criminal Procedure 3.850. See Callaway v. State, 642 So. 2d 636, 640 (Fla. 2d DCA 1994). The trial court could not have treated Hubbard's rule 3.800 motion as a rule 3.850 motion because it was untimely. Id. (finding that defendants could retroactively challenge their sentences under Hale within two years from the time Hale became final, which was February 9, 1994). Therefore, this issue is without merit.

In his second issue, Hubbard argues that his sentences are illegal because they were imposed under the 1989 amended version of section 775.084, which the Florida Supreme Court found unconstitutional in State v. Johnson, 616 So. 2d

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[1] Hubbard received this sentence after this court reversed and remanded his original sentence for forty years as a habitual violent felony offender with a minimum mandatory of fifteen years on count II. See Hubbard v. State, 582 So. 2d 824, 824 (Fla. 2d DCA 1991) (holding that the forty-year sentence exceeded the statutory maximum of thirty years).

1 (Fla. 1993). However, Hubbard has not effectively alleged error under Johnson because chapter 89-280, Laws of Florida, which amended section 775.084, would not have changed his status as a habitual violent felony offender or the corresponding sentences. Id. at 4.

Affirmed.

PARKER, A.C.J., and WHATLEY and SALCINES, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

October 6, 2000

CASE NO.: 2D00-2403
L.T. No. : CRC89-07570-CFANO

John Earl Hubbard v. State Of Florida

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

BY ORDER OF THE COURT:

Appellant's motion for rehearing, rehearing en banc, or certification is denied.

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

Served:

John E. Hubbard Attorney General Karleen F. Deblaker, Clerk

bl

James Birkhold
Clerk