ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JOHN EARL HUBBARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SCOO-2350

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

JURISDICTIONAL BRIEF OF RESPONDENT

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COUNSEL FOR RESPONDENT

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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

John Earl Hubbard, hereinafter referred to as the "petitioner," filed an "Amended Motion To Correct Illegal Sentence" in the trial court in May of 1999, alleging that his consecutive habitual violent felony offender sentences were illegal because it constituted a Hale[1] error. See appendix, State Exhibit 2)[2]. On April 10, 2000, the trial court entered an order denying the 3.800 motion, reasoning that the alleged Hale must be raised in a rule 3.850 hearing because "whether a prisoner's consecutive sentences arise out of a single criminal episode is not a pure question of law," and that the petitioner's 3.800 motion could not be treated as a 3.850 motion as it was time barred. (See appendix, State Exhibit 3). On April 19, 2000, the petitioner filed a motion for rehearing arguing that the "face of the record demonstrate that both offenses arose out of a single criminal episode" and that 3.800 relief is warranted because no evidentiary proceeding is necessary. (See appendix. State Exhibit 4). The trial court entered an order denying the motion for rehearing on April 28, 2000 (See appendix, State Exhibit 5). Petitioner filed his notice of appeal from the trial court's order denying the original motion to correct illegal sentence and the order denying motion for rehearing

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[1] Hale v. State, 630 So.2d 521 (Fla. 1993)

[2]The motion did not allege that the Hale error was apparent on the face of the record or how and where the record demonstrates an entitlement to relief.

on May 13, 2000(See appendix, State Exhibit 6).

Petitioner filed a document asking the appellate court to take judicial notice of the following appellate decisions: Mancino v. State, 714 So.2d 429 (Fla. 1998) and Valdes v. State, 765 So.2d 774 (Fla. 1st DCA 2000).

The Second District Court of Appeal in Hubbard v. State, No. 2D00-2403 (Fla. 2d DCA September 6, 2000) affirmed the reasoning of the trial court. (See Appendix, State Exhibit 1).

Petitioner filed a motion for rehearing, rehearing en banc or certification arguing that the district court overlooked or misapprehended the decisions in Mancino, *supra*, and Valdes. The Second District denied the motion.

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Respondent acknowledges that express and direct conflict exists between the decision of the Second District in Hubbard v. State, *supra*, and that of the First District in Valdes. *supra*. This Court should nevertheless decline to grant discretionary review because the issue was not properly preserved in the trial court nor did the Second District Court have jurisdiction to entertain the initial appeal because the petitioner failed to timely file his notice of appeal.

ARGUMENT

WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION IN HUBBARD V. STATE, *SUPRA*, DECISION OF THIS COURT IN MANCINO, *SUPRA*, AND THE FIRST DISTRICT COURT IN VALDES, *SUPRA*.

Respondent acknowledges that express and direct conflict exists between the decision of the Second District in Hubbard v. State, *supra*, and that of the First District in Valdes. *supra*. This Court, nevertheless, should decline to grant discretionary review under Fla. R. App. Pro. 9.030(a)(2)(A)(iv) (2000). Petitioner failed to allege in his motion to correct illegal sentence (See appendix, State Exhibit 2) that resolution of the alleged Hale error could be determined from the face of the record. *See* Baker v. State, 714 So.2d 1167 (Fla. 1st DCA 1998) wherein the First District stated:

> In order to raise an illegal sentencing claim pursuant to rule 3.800(a), there are a number of requirements:
>
> 1. The error must have resulted in an illegal sentence. (Citations omitted)
> 2. The error must appear on the face of the record. (Citation omitted)
> 3. **The motion must affirmatively allege that "the court records demonstrate on their face an entitlement to relief.** *Mancino, supra* at 433 (FN1)
> (FN1) **We presume this requirement would necessitate more than mere conclusory allegations. *See, e.g. Williams v. State*, 595 So.2d 1061 (Fla. 1st DCA 1992) (affirming denial of 3.850 motion on grounds that motion contained only conclusory allegations in support of claims for relief). The allegations required by Mancino at a minimum would have to address**

where the record demonstrates an entitlement to relief.

(Emphasis added)

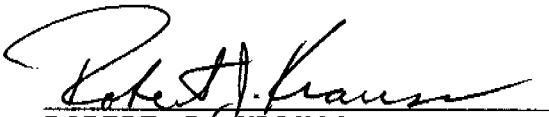
Although the petitioner filed a motion for rehearing with the trial court alleging that the error was apparent on the face of the record and attaching a copy of the criminal arrest affidavit and the criminal information (see appendix, State Exhibit 4), motions for rehearing from a denial of a 3.800 motion are not permitted and the time for filing a timely notice of appeal is not tolled by a rehearing motion. Dwason-Knapp v. State, 679 so.2d 1 (Fla. 2d DCA 1995); Jones v. State, 635 So.2d 989 (Fla. 1st DCA 1994). Since the petitioner failed to properly frame his 3.800 motion, this Court should not address the conflicting opinions because the issue was never properly presented to the trial court nor preserved for for appellate review. Furthermore, since a motion for rehearing from a denial of 3.800 motion is not permitted and does not toll the time for filing a timely notice of appeal, petitioner's notice of appeal, mailed on May 13, 2000, was untimely, as it was mailed more than 30 days after the rendition of the order denying the motion to correct illegal sentence, which was rendered on April 11, 2000; therefore, the appellate court lacked jurisdiction to entertain the appeal on its merits. Dawson-Knapp, *supra*, Jones, *supra*.

CONCLUSION

Respondent respectfully requests that this Court deny review in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John Earl Hubbard, DOC No. 091926, Polk Correctional Institution, 10800 Evans Road, Polk City, Florida 33868-6944, this 22nd day of November, 2000.

COUNSEL FOR RESPONDENT

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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: