

IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC02-627

STATE OF FLORIDA,

Petitioner,

vs.

ANTOINE L. McBRIDE

Respondent.

On Discretionary Review of a Post-Conviction Judgment
and Certified Question of Great Public Importance
from the Fifth District Court of Appeal

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The State seeks discretionary review of a decision of the Fifth District Court of Appeal, which reversed, in part, the denial of Respondent Antoine McBride's *pro se* "Motion for Post-Conviction Relief Pursuant to Fla.R.Crim.Proc., Rule 3.800(a)." The decision below held that McBride's 1990 adjudication as an habitual felony offender for the life felony of attempted first degree murder was an illegal sentence requiring reversal of his sentence and resentencing. R-87-93 (*McBride v. State*, 810 So. 2d 1019 (Fla. 5th DCA 2002)) (State's Appendix to Initial Brief, pp. 1-7).¹

The State's Statement of the Case and Facts is accurate, except for its three references to McBride's "January 19, 2001" motion. Initial Brief, p. 1. The motion was actually dated January 16, 2001. R-10. We restate the facts, in order to provide certain detail omitted by the State's version.

McBride's Rule 3.800 Motion and accompanying Memorandum of Law alleged, *inter alia*, that the offense of attempted first degree murder, at the time of his offense, was "not subject to enhancement under the habitual felony offender statute [§ 775.084, Fla. Stat.]" (R-14) (citations omitted), and that his habitual felony offender sentence for that offense was "subject to correction pursuant to a motion to correct an illegal

¹ Pages 8-10 of the State's Appendix to the Initial Brief appear to have nothing whatsoever to do with this case.

sentence.” *Id.* As he had in a previous motion, which had been denied but not appealed (R-71-75; 80-81), McBride sought to have the habitual felony offender sentence for that offense vacated, and to be resentenced. R-14.

The Honorable William T. Swigert, Circuit Judge for the Fifth Judicial Circuit, issued an Order to Show Cause (R-19), and the State submitted a response “*conced[ing]* that the defendant could not be habitualized for the life felonies [sic] of attempted first degree murder” (emphasis supplied), but opposing relief because the argument had been previously “addressed and resolved against him. . . .” R-17. The court summarily denied the Motion, without reaching the merits of the above claim:

Defendant’s second argument is that his habitualization for 90-1298-CF-A-X (attempted first degree murder with a firearm) is illegal because this crime is actually a life felony pursuant to 775.087(1)(a), Florida Statutes (1989) and therefore does not qualify defendant for habitualization. This exact same issue was previously raised in Defendant’s Motion to Correct Sentence dated June 2, 2000. Defendant’s Motion to Correct Sentence was denied on July 25, 2000.

R-2 (August 27, 2001 Order Denying Motion to Correct Illegal Sentence).

On McBride’s appeal from the summary denial, *the State again acknowledged that McBride was correct on the merits of his argument* that the attempted first degree murder charge was not subject to habitualization: “The State acknowledges that at the time Appellant was sentenced, a defendant could not be habitualized for a

life felony.” R-33 (State’s [5th DCA] Response to Appeal from 3.800 Summary Denial, p. 4). However, the State argued that the post-conviction claim to set aside an illegal sentence was “procedurally barred because it is a successive claim,” having been raised in a prior Rule 3.800 motion that was denied and not appealed. R-32-33. The State asserted that “Appellant procedurally defaulted by failing to appeal [the prior denial] to this Court.” R-32.

The Fifth District Court of Appeal noted that the circuit court had “failed to include the prior motion and order as attachments to its order,” *McBride*, 810 So. 2d at 1021 n. 2 (R-89) (State’s Appendix, p. 3), which ordinarily would require reversal and a remand to the circuit court, but in light of the State’s concession that the habitual felony offender sentence was illegal, the Fifth District reached the merits, reversed in part, and ordered that McBride be resentenced. *Id.* at 1023, *citing Carter v. State*, 786 So. 2d 1173 (Fla. 2001) (decided after McBride’s motion was filed, and holding that habitual offender sentence at a time when the habitual offender statute did not provide for habitualization of life felonies was an “illegal sentence” within the meaning of Rule 3.800, Fla.R.Crim.P.); R-92. ²

² McBride raised two other issues in his post-conviction Motion, which were denied by the circuit court. Those rulings were affirmed by the Fifth District (810 So. 2d at 1020) (R-87, 93) (State’s Appendix, pp. 1, 7), and are not at issue in this Court.

The District Court rejected the State’s argument that McBride’s failure to appeal the denial of his prior motion raising the identical issue constituted a procedural default barring relief, noting that “Rule 3.800(a) does not expressly prohibit successive motions.” 810 So. 2d at 1021 (R-89) (State’s Appendix, p. 3). However, the Court acknowledged that the “law of the case” doctrine could have a preclusive effect on a successive Rule 3.800 motion, and analyzed whether that doctrine applied. Relying on this Court’s recent decision in *Florida Department of Transportation v. Juliano*, 801 So. 2d 101 (Fla. 2001), which discussed and clarified the “law of the case” doctrine, the District Court held that McBride’s failure to appeal the denial of his prior motion did not establish that the trial court’s denial was the law of the case:

Failure to appeal the denial of a prior rule 3.800 motion does not invoke the law of the case doctrine, as the court in *Juliano* was clear that ***the doctrine only applies to issues resolved by the appellate courts. Thus, the trial court’s prior decision does not establish the law of the case in this court.***

McBride, 810 So. 2d at 1023 (R-92) (State’s Appendix, p. 6) (emphasis supplied).

Accordingly, the District Court reversed the denial of post-conviction relief *vis á vis* the illegal habitualization of the attempted first degree murder conviction, and certified the following question as one of great public importance:

IS A DEFENDANT ENTITLED TO RELIEF PURSUANT TO A SUCCESSIVE RULE 3.800(a) MOTION TO CORRECT AN ILLEGAL SENTENCE WHEN THE DEFENDANT RAISED THE IDENTICAL ISSUE IN A PRIOR RULE 3.800(a) MOTION THAT WAS DENIED BY THE TRIAL COURT BUT NEVER APPEALED TO THE DISTRICT COURT OF APPEAL?

McBride, 810 So. 2d at 1023 (R-93) (State's Appendix, p. 7).

The State timely filed a notice to invoke discretionary review, and this Court postponed its decision on jurisdiction, set a briefing schedule, and appointed undersigned counsel to represent McBride.

SUMMARY OF ARGUMENT

Antoine McBride, acting *pro se*, twice brought a Rule 3.800(a), Fla.R.Crim.P., motion challenging his habitual felony offender sentence for the offense of attempted first degree murder, correctly contending that it was an “illegal sentence.” *See Carter v. State*, 786 So. 2d 1173 (Fla. 2001). The first motion was denied, and no appeal was taken. R-80. The second motion was denied as successive, without reaching the merits. R-2. On appeal, the Fifth District Court of Appeal reversed, noting that Rule 3.800(a) does not prohibit successive motions, and that the State had conceded that the sentence was illegal, and held that the trial court’s prior unappealed ruling did not have a preclusive effect under the “law of the case” doctrine. R-87-93. The decision below was correct, and should be approved. The certified question of great public importance should be answered in the affirmative.

Rule 3.800(a) authorizes correction of an illegal sentence “at any time.” Courts are “duty bound to correct an illegal sentence whenever presented with a motion indicating that the sentence is truly illegal.” *Raley v. State*, 675 So. 2d 170, 172 (Fla. 5th DCA 1996). “Certainly in imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the system should willingly remedy

it.” *Id.* (citation omitted). Florida rules and law do not impose a procedural bar in this case.

The State’s argument that McBride’s claim is barred under the doctrine of *res judicata* was not raised in the circuit court or the district court, and is therefore waived. Nonetheless, the State’s argument is incorrect because Florida law does not apply *res judicata* to unappealed denials of prior Rule 3.800 motions. And, the State’s reliance on the procedural default principles in federal habeas corpus cases, under 28 U.S.C. § 2254, is unpersuasive, because none of the State’s cited federal cases involve a claim that a sentence was patently illegal and unauthorized by law, and the federal statutory procedural default rules have no counterpart in Rule 3.800. In contrast to the State’s cited cases, federal decisions construing former Rule 35(a), Federal Rules of Criminal Procedure, which contained an identical provision that relief for an illegal sentence may be granted “at any time,” do provide guidance, and generally reject the notion that successive motions under that rule are barred by *res judicata*.

Therefore, despite the fact that McBride did not appeal the prior denial of the same post-conviction illegal sentence claim, there is no procedural bar to relief and the district court correctly concluded that the challenged habitual felony offender sentence must be reversed and that McBride must be resentenced.

ARGUMENT

AN ILLEGAL SENTENCE IS NOT SUBJECT TO A PROCEDURAL DEFAULT

The necessarily correct result of this case – approval of the decision below – flows inexorably from the undisputed premise that Antoine McBride’s habitual felony offender sentence for attempted first degree murder is an “illegal sentence,” a term that has a special, narrow meaning in Florida law.

This Court has recently adopted the 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*, 786 So. 2d 1173, 1181 (Fla. 2001) (quoting *Blakley v. State*, 746 So. 2d 1182, 1187 (Fla. 4th DCA 1999)). *Carter* also held that an habitual felony offender sentence for a life felony, imposed at a time when the statute did not provide for habitualization of life felonies [as in McBride’s case], constitutes an illegal sentence correctable through Rule 3.800(a), Florida Rules of Criminal Procedure. *Carter*, 786 So. 2d at 1180.

Despite the State’s concession that McBride’s sentence is “illegal” under this Court’s narrow definition, the State asks this Court to deny him relief, arguing that McBride’s motion raising a previously denied-and-unappealed claim is “an *abuse of*

the process, and a *waste of judicial economy*,” . . . “a total *waste of resources* and *abusive* to trial courts” . . . and that “[t]rial courts have *better things to do*” Initial Brief, pp. 3, 6 (emphasis supplied). Those harsh characterizations are unfounded, in fact and law.³

The State argues that relief should be denied because McBride “procedurally defaulted by failing to appeal the trial court’s denial of [his] prior motion.” Initial Brief, p. 4. The question of whether a procedural bar was properly applied is a matter of law entitled to *de novo* review. *Compare West v. State*, 790 So. 2d 513, 514 (Fla. 5th DCA 2001) (“Because West is challenging the finding of a procedural bar, our standard of review is *de novo*”). In fact, since Rule 3.800 motions are limited to sentencing issues that can be resolved as a matter of law without an evidentiary determination, *State v. Callaway*, 658 So. 2d 983, 988 (Fla. 1995), *receded from on other grounds*, *Dixon v. State*, 730 So.2d 265 (Fla.1999), any issues relating to the grant or denial of a Rule 3.800 motion are entitled to *de novo* review. *Cf. State v. Nuckolls*, 677 So. 2d 12 (Fla. 5th DCA 1996) (“The issues in this case revolve around

³ We have found no reported case in which an appellate court has held that a *meritorious* motion to vacate an illegal sentence, even a successive motion, was an abuse of process or a “waste of judicial economy.”

the legal sufficiency of the pleadings and therefore we review *de novo* the trial court's ruling").

The concept of "procedural default" is familiar in the post-conviction context, but inapplicable here. There are two kinds of procedural defaults: "A defendant who did present an issue on direct appeal cannot raise the same issue again in a subsequent postconviction motion, because the decision of the appellate court is the law of the case." *Moore v. State*, 768 So. 2d 1140, 1141 (Fla. 1st DCA 2000). "In contrast, a defendant who did not present an issue on direct appeal when a remedy was then available, cannot raise the issue in a subsequent postconviction motion, because the right to present the issue is waived." *Id.* Since McBride did not take a direct appeal, or appeal the denial of his prior Rule 3.800 motion, it is the latter, waiver doctrine that the State seeks to invoke. *See* Initial Brief, p. 10 ("He had a remedy and failed to pursue it thus waiving the instant claim for later review."). However, in the context of an undisputed claim that a sentence is truly "illegal," the procedural default waiver doctrine does not apply.

The eloquent words of Fifth District Court of Appeal Judge Joe Cowart, Jr. illustrate why the State's position is untenable, as a matter of fundamental fairness and public policy:

“All persons in prison under a sentence for the commission of a crime are there because the judicial system declared they did not follow and obey the law but, to the contrary, they did an illegal act. Certainly in imposing the sanctions of the law upon a defendant for illegal conduct *the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the system should willingly remedy it.* The purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, *our criminal justice system must provide [a] remedy to one in confinement under an illegal sentence.* There is no better objective than to seek to do justice to an imprisoned person.”

Raley v. State, 675 So. 2d 170, 172 (Fla. 5th DCA) (quoting *Hayes v. State*, 598 So. 2d 135, 138 (Fla. 5th DCA 1992) (Coward, J.), *appeal dismissed* 683 So. 2d 484 (Fla. 1996) (emphasis supplied).

Rule 3.800(a), Florida Rules of Criminal Procedure, provides the remedy Judge Cowart spoke of in *Hayes v. State*, and provides, in pertinent part, that “[a] court may *at any time* correct an illegal sentence” (emphasis supplied). The rule “is intended to balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law.” *Carter v. State*, *supra*, 786 So. 2d at 1176; *see also Judge v. State*, 596 So. 2d 73, 77 (Fla. 2d DCA 1992) (*en banc*) (“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”).

As the State recognizes (Initial Brief at 4), Rule 3.800(a) contains no prohibition upon successive motions, and courts have recognized that successive motions under Rule 3.800(a) are permissible. *See Raley, supra*, 675 So. 2d at 173; *Barnes v. State*, 661 So. 2d 71 n. 1 (Fla. 2d DCA 1995). In sum, there are no statutory or jurisprudential barriers to remedying a truly illegal sentence:

We give an unlimited time to defendants to discover these errors because it would be fundamentally unfair in a country governed by the rule of law to permit a person to remain in jail beyond the time that such rule allows. . . . ***There is no reason for the state to impose arbitrary barriers against prisoners who wish to challenge sentences that are truly illegal.***

Brown v. State, 633 So. 2d 112, 116 (Fla. 2d DCA 1994) (Altenbernd, J., concurring in part and dissenting in part) (emphasis supplied).

The cases relied upon by the State in support of its “procedural default” argument are unpersuasive. *Price v. State*, 692 So. 2d 971 (Fla. 2d DCA 1997), involving a post-conviction claim for credit for time spent in jail prior to the imposition of sentence, held that “a defendant is not entitled to successive review of a specific issue which has already been decided against him.” *Id.* at 971. *Price* was decided prior to this Court’s decision in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998), which

held that a claim of credit for jail time served was cognizable in a Rule 3.800 motion, and, the opinion in *Price* is devoid of reasoning for its conclusion. *Price* does not discuss whether or not the defendant's jail time credit claims had merit, or whether that factor should affect the application of a procedural bar. Thus, *Price* should not persuade this Court to overlook the acknowledged merit of McBride's claim, or the extensive analysis of the decision below.

Nor does *Smith v. State*, 685 So. 2d 912 (Fla. 5th DCA 1996), which the State describes as "virtually indistinguishable" from this case (Initial Brief, p. 5), undermine the decision below. In *Smith*, involving a claim for gain time credit, Judge Griffin (who dissented below, in this case), writing for the court, refused to consider a claim that had been previously denied and not appealed. *Id.* However, the *Smith* court found that gain time credit claims could be presented directly to the Department of Corrections or in a petition for writ of habeas corpus. *Id.* at 13. Thus, the availability of those alternative remedies ameliorated the ban imposed by that court on appellate review of the denial of a successive Rule 3.800 motion seeking additional gain time. In a case such as this one, where an admitted illegal sentence has been imposed by the sentencing court, and where *no* administrative remedy is available, *Smith* is unduly restrictive and inconsistent with the plain language of Rule 3.800(a) ("[a] court may at any time correct an illegal sentence. . . ."). Significantly, in McBride's case, Judge

Griffin’s view (that a prior unappealed claim bars a later motion raising the same claim) did not command a majority of the panel. This Court should similarly reject the view that a concededly meritorious Rule 3.800(a) motion is subject to a procedural bar.

The State also cites *Carson v. State*, 747 So. 2d 1002 (Fla. 5th DCA 1999) (Initial Brief, pp. 5-6), but that case is distinguishable on two grounds. First, the defendant’s post-conviction sentencing issue had been raised and rejected on direct appeal. And second, unlike this case, “the sentences Carson received are not illegal.” 747 So. 2d at 1003. The court below recognized that illegal sentence claims that are decided adversely to a defendant *by an appellate court* are barred under the law of the case doctrine. R-90-92; *McBride*, 810 So. 2d at 1022-1023; State’s Appendix, pp. 4-5. We do not dispute that conclusion, which explains the result in *Carson*, as well as in *Rooney v. State*, 699 So. 2d 1027 (Fla. 5th DCA 1997) (claims of trial error had been raised and rejected on direct appeal; procedurally barred post-conviction claims did not include a claim that the sentence was illegal) (*see* Initial Brief p. 6).

The State seeks to avoid the “law of the case” doctrine, which in this case favors *McBride*, by arguing that a post-conviction claim that is denied, but not appealed, becomes *res judicata* between the parties, and under that principle a subsequent motion raising the same claim is precluded. Initial Brief, pp. 6-8; *see Denson v. State*, 775 So. 2d 288, 290 n. 3 (Fla. 2000) (defining and discussing the

term *res judicata*, which ensures finality when a final judgment is conclusive of the rights of the parties).⁴

We first note that this argument – casting a post-conviction procedural bar in *res judicata* terms – was not raised by the State in the trial court nor in the district court of appeal. R-17; R-33. Typically, arguments not made in the trial court are deemed waived. *See Morrison v. State*, ___ So. 2d ___, 27 Fla. L. Weekly S253 (Fla. 2002):

⁴ We observe that, in another case, the State has recognized that an unappealed trial court order, rejecting a defendant’s claim that his sentence was illegal, was not *res judicata*:

This appeal is defendant’s second appeal from denial of a 3.800 motion. Defendant’s initial appeal was dismissed as untimely and thus there was not adjudication on the merits. As to this second motion, the state argued to the trial court that defendant’s motion was barred by the doctrine of *res judicata* and the trial court agreed. ***However, the state now acknowledges that because an illegal sentence can be corrected at any time, a successive motion was not barred.***

Ford v. State, 667 So. 2d 455 (Fla. 4th DCA 1996) (emphasis supplied).

In order to preserve the issue for appellate review, a party must have made the *same argument* to the trial court that it raises on appeal. See *Archer v. State*, 613 So.2d 446, 448 (Fla.1993) (stating the issue "must be presented to the lower court and the *specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved*"); see also *Woods v. State*, 733 So.2d 980, 984 (Fla.1999); *Tillman v. State*, 471 So.2d 32, 35 (Fla.1985); *Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982). Because Morrison did not argue the point he now raises below, he is *foreclosed* from raising that argument here.

(emphasis supplied). Although *Morrison* and the authorities cited therein would appear to foreclose the State's new *res judicata* argument, the argument would be meritless even if properly preserved.

The State relies upon *Denson v. State*, 775 So. 2d 288 (Fla. 2000), where this Court rejected a habeas corpus claim that a fundamental error in sentencing could trump a procedural bar. However, unlike this case, Denson's claims had been previously decided adversely to him *by an appellate court*, not merely by a trial court order. *Id.* at 289. This Court held that "fundamental error cannot be used to obtain additional consideration of claims that have already been decided on the merits *and all direct appellate review has been exhausted.*" *Id.* at 290 (emphasis supplied). Since Denson had "exhausted all appropriate and timely appellate review," 775 So. 2d at 290, *Denson* is not controlling here, where McBride's meritorious claim that his

sentence is illegal has not been previously presented to or rejected by an appellate court. The only decisions to employ the term *res judicata* in the context of a motion to correct an illegal sentence involved claims that had been decided against the defendants by an appellate court. *See Isom v. State*, 800 So. 2d 292 (Fla. 3d DCA 2001); *Rubalcaba v. State*, 729 So. 2d 994 (Fla. 3d DCA 1999). Those cases, like *Denson*, are therefore distinguishable, and not controlling. *Res judicata* does not apply.

The State's final argument is that the procedural default principles that govern federal habeas corpus review of state court convictions, under 28 U.S.C. § 2254, somehow counsel against a Florida court correcting a Florida sentence that is admittedly patently illegal under Florida law. *See* Initial Brief pp. 8-10. The attempted analogy is inapt, for numerous reasons.

First, *none* of the federal cases cited by the State involve a claim that a sentence was illegal. Second, the procedural requirements of federal habeas corpus proceedings are purely statutory, and have no counterpart in the Florida statutes and rules of procedure, which govern this case.⁵ Indeed, unlike 28 U.S.C. § 2254, upon

⁵ The State suggests that Section 924.051(8), Florida Statutes, providing for strict enforcement of all procedural bars in criminal appellate and collateral criminal proceedings, supports the State's argument. (Initial Brief, pp. 10-11). That statute begs the question, however, of whether a procedural bar *exists* in the factual and

which the State relies, Rule 3.800(a) authorizes relief “at any time.” And third, the reason that 28 U.S.C. § 2254 requires exhaustion of state remedies before a federal habeas corpus remedy may be invoked to correct an alleged error of federal law is the careful balance of power between federal and state government, and Congress’ recognition that state courts, like federal courts, are competent to decide issues of federal law. *See generally Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000) (discussing the increasingly limited role of federal habeas courts in reviewing state court convictions, under the 1996 Antiterrorism and Effective Death Penalty Act, amending 28 U.S.C. § 2254). Those federalism concerns play *no* part in deciding whether a Florida trial court’s previously unappealed denial of a post-conviction motion should operate as a procedural bar to Florida appellate review of a subsequent motion alleging again (properly, in this case), that a defendant’s sentence is “illegal.” Thus, the State’s discussion of federal habeas procedural default cases is simply inapposite.

However, analogies to federal law may at times inform this Court’s application of its own rules of procedure. *See Dinter v. Brewer*, 420 So. 2d 932, 934 n. 2 (Fla. 3d DCA 1982) (“Decisions and commentaries under the federal rules are persuasive

procedural posture of this case.

guidelines to the interpretation of state rules closely patterned thereon.”). A useful analogy is found in cases involving the former Rule 35(a), Federal Rules of Criminal Procedure, which then provided (like Rule 3.800(a), Florida Rules of Criminal Procedure, now provides), that “the court may correct an illegal sentence at any time. . . .”⁶

For example, in *Ekberg v. United States*, 167 F.2d 380 (1st Cir. 1948), the court observed that *res judicata* concepts did not bar relief in a successive Rule 35 motion alleging that a sentence was illegal:

Since under Rule 35, the sentencing court may correct an illegal sentence “at any time,” . . . we think it clear that the court below would have had power to entertain and grant Ekberg’s second motion, notwithstanding its denial of the earlier motion to the same effect, assuming the motion was a meritorious one. If convinced of its previous error, the sentencing court should have continuing power to correct its own illegal sentence. . . . ***The rule of res judicata is not in all strictness applied in habeas corpus cases.*** A judge is not precluded from entertaining the petition for habeas corpus and disposing of it on the merits, even though the same point had been ruled adversely to the petitioner in a previous habeas corpus proceeding. . . . ***A fortiori a ruling by the trial judge, at an earlier stage of the same criminal proceeding, on a motion to correct a sentence, does not operate as res judicata.***

⁶ Rule 35 was amended effective November 1, 1987 (Pub.L. 98-473), and no longer contains that language.

167 F.2d at 384 (emphasis supplied); accord *United States v. Quon*, 241 F.2d 161, 163 (2d Cir. 1957) (“We agree with the *Ekberg* decision”); see also *United States v. Mazak*, 789 F.2d 580 (7th Cir. 1986) (“Rule 35(a), in allowing correction of an illegal sentence at any time, has been held to permit successive motions without encountering the bar of res judicata”) (citing cases); *United States v. Savely*, 814 F. Supp. 1519, 1523-1524 (D. Kan. 1993) (there are “no procedural barriers under Rule 35(a)”)⁷.

Similarly, in *Heflin v. United States*, 358 U.S. 415, 79 S. Ct. 451, 3 L.Ed.2d 407 (1959), a federal prisoner brought a post-conviction claim under 28 U.S.C. § 2255, which then contained a provision that “a motion for such relief may be made at any time.” The Supreme Court granted relief, and in a concurring opinion joined by five members of the Court, discussing Section 2255, Justice Stewart wrote that “[t]his latter provision [“at any time”] simply means that . . . there is no statute of

⁷ We acknowledge the contrary minority view of the United States Court of Appeals for the Third Circuit in *United States v. Kress*, 944 F.2d 155 (3d Cir. 1991), which found a successive Rule 35 motion challenging the legality of the rate of interest imposed on a restitution judgment to be barred under the doctrine of *res judicata*. *Id.* at 161-162. However, the issue before that court was not as compelling as the sentence here, which the State has acknowledged is illegal, and which imposes additional incarceration, not additional restitution. Thus, *Kress* is not persuasive in this case.

limitations, *no res judicata*, and that the doctrine of laches is inapplicable.” 358 U.S. at 420, 79 S. Ct. at 454 (Stewart, J., concurring) (emphasis supplied).

The foregoing federal Rule 35 cases are consistent with the decision below and with existing Florida law, which allows the doctrine of law of the case to operate as a procedural bar if a claim of an illegal sentence has been raised and rejected by an *appellate* court (see R-90-91), but which does not apply the doctrine of *res judicata* to preclude a meritorious claim of an illegal sentence simply because it has been denied previously by a trial court. See *Ford v. State*, footnote 4, *supra*. Indeed, the State’s arguments are unsupportable by precedent. See *Lawton v. State*, 731 So. 2d 60 (Fla. 2d DCA 1999), where the State *conceded* that a trial court’s erroneous denial of a successive but meritorious motion to correct an illegal sentence was a *denial of substantive due process*, and the district court of appeal reversed the denial of relief, holding that any other result would be a “manifest injustice.” 731 So. 2d at 61. See also *Crotts v. State*, 795 So. 2d 1020, 1021 (Fla. 2d DCA 2001) (“substantive due process requires that a patently illegal sentence be corrected despite the law-of-the-case doctrine”) (citing *Lawton*).

In this case, the State steadfastly insists that a procedural default warrants the denial of relief, despite the fact that under *Carter v. State*, 786 So. 2d 1173, McBride’s habitual offender sentence “imposes a kind of punishment that no judge under the

entire body of sentencing statutes could possibly inflict under any set of factual circumstances.”” *Id.* at 1181 (internal citation omitted). Since our system of criminal justice cannot countenance that result, *Raley v. State; Brown v. State, supra*, this Court should reject the State’s arguments, and approve the decision below.

CONCLUSION

For the foregoing reasons, the certified question should be answered in the affirmative, and the decision below should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished to ROBIN A. COMPTON, Assistant Attorney General, and KELLIE A. NIELAN, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, by FedEx this 28th day of May, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font, and is in compliance with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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