IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC02-627

ANTOINE L. McBRIDE,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the District Court of Appeal
of the State of Florida
Fifth District

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STATEMENT OF THE CASE AND FACTS

After entering pleas of nolo contendere, Respondent was sentenced as an habitual offender on December 3, 1990, to thirty years imprisonment on each count for the offenses of attempted first degree murder with a firearm, possession of a firearm by a convicted felon and robbery with a firearm. *McBride v. State*, 665 So.2d 329 (Fla. 5th DCA 1995). He took no direct appeal. He has, however, filed several 3.800 motions to correct illegal sentence. He filed one on July 17, 1995, the second on November 6, 1997, the third on June 2, 2000, and his most recent 3.800(a) motion was filed on January 19, 2001, which is the subject of the instant case. (R2)

In his January 19, 2001 motion, McBride contends that he was illegally sentenced as an habitual felony offender for the life felony of attempted first degree murder. (R5-7, 11) His offense occurred on May 26, 1990. (R87-93) In its response, the State pointed out that the issue had previously been raised and conceded that McBride could not be habitualized for the life felonies of attempted first degree murder. (R15-16) On August 27, 2001, the trial court denied the motion, finding that McBride had previously raised the exact same issue in his June 2, 2000 motion which was denied on July 25, 2000. (R2-3) No appeal had been taken from the trial court's July 25, 2000

order. McBride did appeal the August 27, 2001 order denying the January 19, 2001 order to the Fifth District Court of Appeal. After requiring a response from the State, the Fifth District reversed on March 8, 2002, finding that the sentence imposed as an habitual offender for attempted first degree murder constitutes an illegal sentence because the habitual felony offender statute in effect at the time McBride committed the offense did not include life felonies within the offenses that qualified for an enhanced sentence under the statute. (R87-93) The district court further held that because McBride had failed to appeal the claim when he raised it in 2000, no appellate court had heard the claim and therefore the law of the case doctrine did not bar the claim from being heard in a successive 3.800(a) motion. (R87-93)

The Fifth District Court of Appeal 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?

(R87-93) On March 11, 2002, the State filed a Notice to Invoke the Discretionary Jurisdiction of this Court. (R94-95) On March 25, 2002, this Court postponed its decision on

jurisdiction and ordered merits briefs to be filed.

SUMMARY OF THE ARGUMENT

Where a defendant raises an issue under Florida Rule of Criminal Procedure 3.800, the lower court denies relief and the defendant fails to appeal, he should not be allowed to later raise the same issue in a second 3.800 motion. It is successive, an abuse of the process, and a waste of judicial economy. McBride had his day in court, could have sought his remedy by filing an appeal, but failed to do so through his own fault. He should not be allowed to "restart" the clock on an appeal by starting all over raising the same issue previously raised.

ARGUMENT

POINT ON REVIEW

A DEFENDANT IS NOT 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.

Florida Rule of Criminal Procedure 3.800(a), provides that a court may at any time correct an illegal sentence imposed by it. However, there is no specific provision, which bars the filing of successive motions. *Barnes v. State*, 661 So.2d 71 (Fla. 2d DCA 1995). It must be noted, however, that a defendant is not entitled to successive review of a specific issue which has already been decided. *Brazell v. State*, 770 So.2d 189 (Fla. 2d DCA 2000).

It is the State's position that McBride is not entitled to relief because he previously raised the exact identical issue in an earlier 3.800(a) motion and procedurally defaulted by failing to appeal the trial court's denial of that prior motion.

In *Price v. State*, 692 So.2d 971 (Fla. 2d DCA 1997), the defendant filed a 3.800 motion where he alleged he was not given proper credit for jail time served in five lower court cases. He had previously raised the same argument regarding four out of the five cases and the trial court denied the motion as

successive and attached the earlier order denying relief. As in the instant case, Price did not appeal the earlier order denying relief. The district court affirmed in part, only reversing on the one lower court case which had not been previously raised in the earlier 3.800 motion. In affirming, the district court held that a defendant is not entitled to successive review of a specific issue which had already been decided against him. This Court should adopt the position of the Second District and hold in the instant case that even though the issue was not decided by an appellate court in the previous 3.800 motion, McBride is not entitled to successive review of the same issue.

In *Smith v. State*, 685 So.2d 912 (Fla. 5th DCA 1996), the defendant attempted to seek a belated appeal of an order denying a 3.800 motion. As in the instant case, the defendant in *Smith* had already raised the same issue in a previous 3.800 motion and failed to appeal the order denying it. He then filed a successive 3.800 motion raising the same issue. The Fifth District Court of Appeal held that when a defendant raises an issue under the rule governing motions to correct sentence, the lower court denies relief and the defendant fails to appeal, the defendant may not later raise the same issue in another motion to correct sentence. The instant case is virtually indistinguishable from *Smith*.

Similarly, in *Carson v. State*, 747 So.2d 1002 (Fla. 5th DCA 1999), *rev. denied*, 766 So.2d 220 (Fla. 2000), the defendant attempted to raise the same issue in a second motion to correct illegal sentence which had previously been raised on direct appeal and in a prior 3.800 motion which was dismissed on appeal. The district court held that the issue could not be raised again and to do so would subject Carson to sanctions.

It is an abuse of the process to continuously raise the same issues after they have been decided on the merits. *Rooney v. State*, 699 So.2d 1027 (Fla. 5th DCA 1997). McBride's prior 3.800(a) motion filed in 2000 specifically addressed the same issue raised in the most current 3.800 motion. The trial court decided the issue on the merits. The trial court held that McBride was correct that his habitual felony offender sentence for the life felony was improper. However, it denied relief because he was properly sentenced to the same thirty years on the remaining two counts and because if McBride were to be resentenced, he would be facing a potential **life sentence** instead of the thirty years he received.

Through no fault of the state, McBride failed to appeal the denial of his 3.800 motion filed in 2000. It would be a total waste of resources and abusive to the trial courts to allow a

defendant to continuously file numerous 3.800(a) motions over and over again raising the same exact issue if it was never appealed. At some point enough is enough. Trial courts have better things to do than rehear the same issue just because the defendant failed to appeal it the first time it was denied.

The district court has confused waiver, resulting in a default, with the law of the case doctrine. Rather than deciding the issue based on "law of the case" as the district court did in the instant case, Petitioner urges this Court to consider "*res judicata*." *Res judicata*, translated from the Latin means "matter adjudged." *Denson v. State*, 775 So.2d 288, n.3 (Fla. 2000). The doctrine of *res judicata* provides that a final judgment on the merits is conclusive of the rights of the parties and constitutes a bar to a subsequent action or suit involving the same cause of action or subject matter. *Id*.

In *Denson, supra*, this Court denied the defendant's claim of an illegal sentence as procedurally barred because the claim had already been decided against him on the merits and he had exhausted all appropriate and timely appellate review. Just as McBride believes he can raise the same issue once again because a trial court may correct an illegal sentence at any time pursuant to 3.800(a), Denson argued that he was not barred from raising the claim again because it was fundamental error. This

Court explained:

> Nevertheless, the concept of fundamental error was never intended to provide litigants with a means to circumvent the type of procedural bar that occurs when the exact claim has already been decided on the merits and is thus *res judicata*. For us to conclude otherwise would result in litigants being allowed to repeatedly raise issues that have already been decided on the merits simply by labeling them as "fundamental error." This would be a waste of our limited judicial resources. Therefore, 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.

Denson, at 290.

In the instant case, the issue had already been decided on the merits in 2000 by the trial court. The trial court agreed that the habitual offender sentence for the life felony was improper but denied relief anyway. McBride's remedy was to appeal the trial court's decision and he failed to do so. To allow a defendant to file the same motion with the trial court again in order to get to the appellate court circumvents the entire purpose behind having Florida Rule of Appellate Procedure 9.110(b) which requires that a notice of appeal be filed within 30 days. There should be no exceptions.

In federal court, pursuant to 28 U.S.C. section 2254(b), a court may not grant an application for a writ of habeas corpus

on behalf of a person in state custody unless the Petitioner has exhausted the remedies available in state court first. To satisfy the exhaustion requirement, a state prisoner must have presented the state courts with the same factual and legal claims that are asserted in the federal petition. *Picard v. Connor*, 404 U.S. 270 (1971). If a defendant such as McBride failed to appeal to the highest state court, his claim would be barred on habeas review because he failed to exhaust his claim and procedurally defaulted. *See Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979)(exhaustion requires not only the filing of a rule 3.850 motion, but an appeal of its denial); *see also Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir. 1991)(the petitioner waived his claim of ineffective assistance of counsel, which was presented in a post conviction petition, for purposes of habeas review by failing to appeal the denial of the post conviction petition); *Smith v. Jones*, 923 F.2d 588 (8th Cir. 1991)(claims presented in post conviction motion and not appealed were procedurally barred in subsequent habeas proceedings).

A defendant in federal court who raises claims in his federal habeas petition but fails to appeal in state court, has defaulted as to those claims and is procedurally barred from raising them on federal habeas review. *Coleman v. Thompson*, 501 U.S. 722 (1991). While the claims are technically unexhausted,

the defendant would be barred from raising them in state court because the time for filing his or her appeal (30 days) would have long expired or because the defendant had an appeal and is not entitled to a second appeal. *Id.*

In *Rose v. Lundy*, 455 U.S. 509 (1982), the purpose of exhaustion as it pertains to state court was discussed:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose v. Lundy, 455 at 514. (Citations omitted)

This Court should follow the reasoning of the federal courts and not allow defendants such as McBride to repeatedly raise an issue that has clearly been procedurally defaulted.

Clearly, McBride knew how to file an appeal as he had filed so many. To give him a "second bite of the apple" is unfair to

both the state and the trial court who expended the time already in a previous motion.

> Frivolous successive collateral attacks on criminal convictions and sentences unnecessarily burden the appellate process and cannot be tolerated.

Pinkney v. State, 682 So.2d 1182, 1184 (Fla. 5th DCA 1996).

The matter in the instant case should have been cleared up previously. McBride has given no reason for the court to relieve him of his own procedural default. He had a remedy and failed to pursue it thus waiving the instant claim for later review. Section 924.051(8), Florida Statutes, provides:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved **at the first opportunity**. It is also the Legislature's intent that **all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state**.

(Emphasis added) This Court should put a stop to the endless successive filings of collateral motions by defendants. Judicial economy requires it. Judicial caseloads are never reduced but are constantly on the rise. Numerous hours have now been unnecessarily spent on this case alone by judges,

attorneys, clerks, staff, and now justices, all because McBride failed to appeal a prior ruling. Appellate rules are meaningless for 3.800(a) motions if a defendant such as McBride is allowed to file motion after motion in the trial court raising the same issue over and over again until it is appealed at the time of his choosing. That is ridiculous. Florida Rules of Appellate Procedure 9.110(b) and 9.140(b)(3) require that a notice of appeal be filed within 30 days. Failing to file within that 30 day time period is a procedural default. The clock should not be restarted. This Court should answer the certified question in the negative.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner requests this honorable Court to answer the certified question in the negative and hold that a defendant is **not** 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief on the Merits has been furnished by U.S. Mail to Bruce S. Rogow and Beverly A. Pohl, counsel for Respondent, Broward Financial Centre, 500 East Broward Boulevard, Suite 1930, Fort Lauderdale, FL, 33394, this ___ day of May, 2002.

_____
Robin A. Compton
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and type of font used in this brief is 12 point Courier New, a font which is not proportionately spaced.

_____
Robin A. Compton
Assistant Attorney General