IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-2163

DARYL WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENTS'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

STATMENT OF THE CASE AND FACTS

On or about February 4, 2005, Petitioner, Daryl Williams, acting pro se, filed a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). In that motion, he asserted that the written sentence in Palm Beach County Circuit Court case number 99-3577CF A02 failed to comport with the sentence which was orally imposed by the sentencing judge. Specifically, Petitioner alleged that the judge had orally sentenced him to eleven years in prison on December 21, 1999 and that the written sentencing order was off by about forty-three months. He further alleged that this would be apparent from the transcript of the sentencing hearing on December 21, 1999.

The motion was not made under oath and Petitioner did not attach anything to his motion, such as the written sentencing documents or the sentencing hearing transcript. Moreover, as it later turned out, Petitioner had entered a plea and had not taken an appeal so no sentencing hearing transcript had ever been prepared.

On March 1, 2005, the circuit court judge issued an order denying this Rule 3.800(a) motion because it was legally insufficient and attaching 1) the written sentence showing Petitioner had been sentenced to 175 months (14 years and 7

months) in prison and 2) the Clerk of Court's handwritten notes of that sentencing hearing showing the same. Incidentally, the written sentencing document showed that it was signed by the judge and filed by the clerk on December 21, 1999, the same day as the sentencing hearing itself.

Petitioner filed a motion for rehearing asserting the trial court's attachments did not sufficiently refute his claim and that the only way to refute his allegations was to refer to the actual transcript of the sentencing proceeding. Rehearing was denied.

Petitioner appealed the summary denial of his Rule 3.800(a) motion to the District Court of Appeal of the State of Florida, Fourth District, in case number 4D05-1537. The Fourth District initially issued a per curiam affirmance citing Campbell v. State, 718 So. 2d 886 (Fla. 4th DCA 1998. On motion for rehearing and request to certify direct conflict, however, the Fourth District issued a new opinion expressly stating that the court was affirming the denial of the Rule 3.800(a) motion, again citing Campbell v. State, 718 So. 2d 886 (Fla. 4th DCA 1998). They noted that Petitioner had not attached anything to support his unsworn motion such as a transcript of the sentencing hearing and they certified conflict with Fitzpatrick v. State, 863 So. 2d 462 (Fla. 1st DCA 2004), and Berthiaume v. State, 864

So. 2d 1257 (Fla. 5th DCA 2004). They further ruled that the mere allegation of a difference between the written sentence and the oral pronouncement was not cognizable in a Rule 3.800(a) motion and certified conflict with Watts v. State, 790 So. 2d 1175 (Fla. 2d DCA 2001). Finally, the appellate court noted that Rule 3.800(a), in contrast to Rule 3.850(d), contained no requirement that the trial court attach portions of the record conclusively refuting the allegations of the motion.

Petitioner invoked the discretionary jurisdiction of this Court. Counsel was appointed for Petitioner. After filing the initial brief on the merits, Petitioner's counsel filed a Suggestion of Mootness acknowledging that Petitioner had finally had the sentencing hearing transcript prepared and that Petitioner's representations of a conflict between oral and written sentence were, in fact, erroneous; the transcript showed that the judge had orally pronounced a sentence of 175 months in prison, the same sentence as was denoted on the written sentencing documents.

Petitioner requested this Court to nonetheless consider the issues raised in his initial brief, claiming they were of great public importance. Respondent filed a response asserting that this Court should dismiss the case as it was moot and there was not sufficient reason for this Court to consider the issues

raised by Petitioner. Respondent does not waive the assertion this proceeding should be dismissed as moot but, as this Court has not yet ruled on the issue of mootness, Respondent's brief on the merits follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal properly affirmed the trial court's order summarily denying Petitioner's Florida Rule of Criminal Procedure 3.800(a) motion. As the Fourth District recognized, Petitioner's claim that the written sentence did not comport with the oral pronouncement was not cognizable under Rule 3.800(a).

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT ORDER SUMMARILY DENYING RELIEF AS PETITIONER'S CLAIM WAS FACIALLY INSUFFICIENT. (RESTATED).

Petitioner claimed below that he was entitled to post-conviction relief because there was a discrepancy between his oral and written sentences. However, as the Fourth District properly concluded, claims of this nature are not cognizable under Florida Rule of Criminal Procedure 3.800(a). See Campbell v. State, 718 So. 2d 886 (Fla. 4th DCA 1998); Rinderer v. State, 857 so. 2d 955 (Fla. 4th DCA 2003); Covell v. State, 891 So. 2d 1132 (Fla. 4th DCA 2005).

This Court has jurisdiction pursuant to Fla. R. 9.030(a)(2)(A)(vi), to review petitioner's assertion that the allegation of a conflict between the oral and written sentence is a cognizable claim under rule 3.800(a). Here, the Fourth District Court of Appeal certified conflict with Fitzpatrick v. State, 863 So. 2d 462 (Fla. 1st DCA 2004), Berthiaume v. State, 864 So. 2d 1257 (Fla. 5th DCA 2004), and Watts v. State, 790 So. 2d 1175 (Fla. 2d DCA 2001), on the ground that the mere allegation of a conflict between the oral and written sentence was not a cognizable claim under rule 3.800(a), especially where Petitioner did not attach any documents to support his unsworn

allegation.

Petitioner states that there are four issues to be resolved: 1) whether an alleged deviation between the incarcerative portion of a written judgment and the oral pronouncement of sentence is an illegal sentence that may be corrected via a Rule 3.800(a) motion; 2) whether a movant may plead a prima facie case for relief under Rule 3.800(a) by identifying with particularity the nonhearsay record documents, such as the transcript, upon which he or she relies, without actually attaching them; whether a trial court, before denying a Rule 3.800(a) motion that alleges a deviation between the incarcerative portion of a written judgment and the oral pronouncement of sentenced, must attach record documents that conclusively refute the defendant/movant's allegations, and 4) if the portions of the record referenced in the Rule 3.800(a) motion do not exist or cannot be located, but the allegations are not conclusively refuted by the record, what is the proper disposition of the motion. (IB 6)

The State would initially note that the fourth issue presented by Petitioner certainly was not an issue on which the Fourth District certified conflict. In fact, it was never at issue below at any time. In light of the fact that this argument was not raised below, it is improperly raised for the

first time here, and should not now be addressed. See Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982) (declining to address issue raised for first time in petition for review); White v. State, 714 So. 2d 440 (Fla. 1988)(declining to address issue which was beyond the scope of the certified conflict).

Turning to the merits, Petitioner's claim that a written sentence is illegal because it does not conform with the oral pronouncement is simply wrong.

Rule 3.800(a) provides:

> A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, or a sentence that does not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief, provided that a party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b)(1) or during the pendency of a direct appeal.

In Davis v. State, 661 So. 2d 1193 (Fla. 1995), this Court defined an illegal sentence as a sentence that exceeds the statutory maximum. Then, in State v. Mancino, 714 So. 2d 429 (Fla. 1998), this Court expanded the definition of an illegal sentence and found that an illegal sentence is one that patently fails to comport with statutory or constitutional limitations.

In Campbell v. State, 718 So. 2d 886 (Fla 4th DCA 1998), the Fourth District Court of Appeal interpreted this Court's definition as set out in Mancino and found the following:

> In Mancino, the Supreme Court explained that "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'." Id. at S303. The rule the oral pronouncement of the sentence that controls in the event of a discrepancy between the oral pronouncement and the written sentence is found in the Florida Rules of Criminal Procedure, not the Florida Statutes or the state or federal constitutions. Fla. R. Crim. Pro. 3.700(1). If there was an error in Campbell's sentence, it was caused by noncompliance with a procedural rule, and therefore does not result in an "illegal sentence" under the Mancino definition.

Subsequent to Campbell, this Court further noted in the Carter case that a sentence is illegal if it imposes a kind of punishment that no judge under the entire body of sentencing statutes could possible inflict under any set of factual circumstances. See Carter v. State, 786 So. 2d 1173 (Fla. 2001). In Carter, 786 So. 2d at 1178, this Court stated as follows:

> We continue to refine our definition of "illegal sentence" in an attempt to strike the proper balance between concerns for finality and concerns for fundamental fairness in sentencing. In this endeavor, we have been assisted ably by the appellate courts, which continue to be confronted daily with the question of what sentences are "illegal" and correctable "at any time" and what sentences, although failing to comply with the law, are not subject to

> correction. Attempting to formulate a more workable definition of "illegal sentence," Judge Farmer has explained:
>
> > To be illegal within the meaning of rule 3.800(a) the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. On the other hand, if it is possible under all the sentencing statutes--given a specific set of facts--to impose a particular sentence, then the sentence will not be illegal within rule 3.800(a) even though the judge erred in imposing it Blakley v. State, 746 So. 2d 1182, 1186-87 (Fla. 4th DCA 1999).

This Court went on to approve of Judge Farmer's definition that a sentence is "illegal" if it "imposes a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances"--because it comes close to formulating a workable definition of "illegal" sentence. Carter, 786 So. 2d at 1181. In Carter, 786 So. 2d at 1173-1181, this Court held that a habitual offender sentence for a life felony, imposed when the habitual offender statute did not authorize it, was illegal.

Although the definition of an illegal sentence has been refined over the past few years, it is still true that the primary evil that Rule 3.800 is meant to correct is that of a sentence that exceeds the statutory maximum and there are very

few alternate claims that fall within the illegality contemplated by Rule 3.800(a). As this Court stated in Wright v. State, 911 So. 2d 81, 83-84 (Fla. 2005):

> Since Davis, we have found few other claims that come within the illegality contemplated by the rule. Mack, 823 So. 2d at 751 (holding that when a defendant not initially sentenced as a habitual offender is given habitual offender status upon resentencing, and the error is apparent on the face of the record, the sentence is illegal and subject to a rule 3.800(a) challenge); Bover v. State, 797 So. 2d 1246, 1247 (Fla. 2001) ("Where the requisite predicate felonies essential to qualify a defendant for habitualization do not exist as a matter of law and that error is apparent from the face of the record, rule 3.800(a) can be used to correct the resulting habitual offender sentence."); Carter, 786 So. 2d at 1180 (holding that a habitual offender sentence is illegal when the habitual offender statute in effect at the time of the crime prohibited a court from imposing habitual offender status); Mancino, 714 So. 2d at 433 (holding that a sentence can be challenged under rule 3.800(a) "if the record reflects that a defendant has served time prior to sentencing on the charge," and the sentence "does not properly credit the defendant with time served"); Hopping v. State, 708 So. 2d 263, 265 (Fla. 1998) ("Where it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800."). Hence, while the illegality contemplated by the rule may be invoked at any time, even after the illegal sentence has been erroneously affirmed on appeal, the illegality must be of a fundamental nature.
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> * * *

> While it is not the only evil of illegality contemplated by rule 3.800, we noted in Davis that it was this fundamental concern to correct a sentence in excess of the legal maximum that provided the primary example for the rule's policy of providing unlimited time to challenge a wrongful imprisonment. Davis, 661 So. 2d at 1196.

Based on this Court's jurisprudence, the State would first point out that Petitioner's sentence in the instant case was legal in the sense that there was no allegation it exceeded the statutory maximum for the crime of which Petitioner was convicted. Nor does Petitioner's sentence constitute one of the other illegalities contemplated by Rule 3.800(a). That is, the mere allegation of a conflict between the oral and written sentence does not automatically state a prima facie case that a sentence is illegal. As the Fourth District recognized in Campbell, 718 So. 2d at 886, the rule that the oral pronouncement of the sentence that controls on the event of a discrepancy between the oral pronouncement of the sentence and the written sentence is found in the Florida Rules of Criminal Procedure, not the Florida Statutes or the state or federal constitutions. See also, Maddox v. State, 760 So. 2d 89, 104 (Fla. 2000)(determination that oral imposition of sanctions should control over later contrary written orders is merely a "judicial policy").

If there was an error in the sentence, it was caused by

noncompliance with a procedural rule and therefore did not result in an illegal sentence. It is well worth noting that although the rules of criminal procedure in this State require the oral pronouncement to control over the written pronouncement, it could just as easily be the other way around, as in juvenile cases where juvenile procedure does not require the court to pronounce the disposition in court. N.C. v. Anderson, 837 So. 2d 425 (Fla. 4th DCA 2002). Clearly, there is no true due process concern in permitting a written sentence to control over the oral pronouncement since the court is required to serve counsel for the parties with a copy of the written sentence and any errors contained therein may easily be corrected by use of Rule 3.800(b), for example. In fact, in Maddox, 760 So. 2d at 104, this Court noted that Rule 3.800(b)(2) was intended to resolve any due process concerns regarding notice and an opportunity to object to the written sentence. Consequently, the Fourth District did not err in affirming the summary denial of Petitioner's Rule 3.800(a) motion as the mere failure to comply with a rule of criminal procedure did not automatically equate to a claim of statutory or constitutional dimension so serious as to result in an illegal sentence.

Admittedly, this Court has previously found that the

allegation that a sentence that was increased upon resentencing in violation of the Double Jeopardy Clause may state a facially sufficient claim for Rule 3.800(a) relief even if the sentence does not exceed the maximum allowable for the crime. Hopping v. State, 708 So. 2d 263, 265 (Fla. 1998). However, the record does not demonstrate that Petitioner's sentence was entered in violation of double jeopardy principles; there was no “re-sentencing” in the instant case.

In Hopping, the defendant mistakenly thought his sentence was erroneous so he filed a Rule 3.800(a) motion to correct the sentence and the trial court responded with an order that had the practical effect of doubling Hopping’s sentence. Hopping filed a second Rule 3.800(a) motion seeking to correct the doubling. This Court found that a sentence that was increased upon resentencing in violation of the Double Jeopardy Clause constituted an illegal sentence in that it exceeded "the maximum period set forth by law for a particular offense without regard to the guidelines." This Court held that "where it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800." Id.

Subsequently, in Ashley v. State, 850 So. 2d 1265 (Fla.

2003), this Court reviewed an express and direct conflict between the First District in Ashley v. State, 772 So. 2d 42 (Fla. 1st DCA 2000), and the Fourth District in Evans v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996). The issue, as framed by this Court, was whether a trial court could bring a defendant back to court, vacate the sentence imposed, and then resentence him to what amounted to a more onerous sentence after the defendant had already begun serving the original sentence. Ashley, 850 So. 2d at 1266. This Court agreed with the Fourth District's decision in Evans and held that, once a sentence has been imposed and the person begins to serve the sentence, the sentence may not be increased without running afoul of double jeopardy principles. Id.

In this case, where Petitioner did not allege in his motion that he began serving his oral sentence before the written sentence was issued, and where the written sentence actually appears to have been issued on the same day as the oral sentence, double jeopardy principles do not apply. In Renaud v. State, 901 So. 2d 1032 (Fla. 4th DCA 2005), review dismissed, No. SC05-1005 (Fla., March 23, 2006)(no motion for rehearing allowed), the issue was that the written sentence did not comport with the oral pronouncement. In deciding jurisdiction was improvidently granted, this Court pointed out that, where

the oral pronouncement and the written sentencing order were imposed at the same hearing, there was no double jeopardy violation. This was based on the reasoning that the petitioner had not yet begun serving the oral sentence before the written sentence was issued. The Court therefore ruled that Renaud's claim was not cognizable in a Rule 3.800(a) motion.

Again, given the Renaud decision and given the instant record before this Court, it is evident Petitioner has not sufficiently alleged or demonstrated a double jeopardy violation. Here, there is nothing to show that the trial court orally pronounced the sentence, sent Petitioner out to serve it, brought Petitioner back to court to correct an error, vacated the sentence imposed, and then resentenced him to a more onerous sentence, as happened in Ashley. Consequently, as Renaud shows, Petitioner's motion was facially insufficient and, furthermore, Petitioner's double jeopardy claim was meritless in that the record did not show the written pronouncement was anything other than a legal sentence. Hence, Petitioner's reliance on Hopping and Ashley is misplaced.

Here, it is clear that the Fourth District Court of Appeals properly found that Petitioner was not entitled to relief based on a mere allegation of a discrepancy between the oral and written sentences. Claims of this nature are not cognizable

under Rule 3.800(a).

This is all the more true when one considers that the claim was raised in an unsworn Rule 3.800(a) motion instead of a sworn 3.850 motion and that Petitioner failed to attach the necessary documents demonstrating his entitlement to relief. In Erickson v. State, 760 So. 2d 983 (Fla. 4th DCA 2000), Erickson appealed the denial of his Rule 3.800(a) motion to allow credit for jail time. In response, the judge attached a copy of the arrest warrant in the file showing Erickson had been arrested over three months after the date alleged in the motion and supporting the judge's conclusion Erickson had been awarded all the necessary credit. On appeal, Erickson supplied the appellate court with a copy of a second arrest warrant supporting his motion. This second warrant was not part of the court file and was never presented to the lower court judge. The Fourth District ruled that the judge had properly denied Erickson's motion because the judge had been limited to the materials originally in the court file.

In this case, as in the Erickson case, the judge was limited to the materials that were already in the court file. Apparently, Petitioner never bothered to ascertain whether the sentencing hearing transcript had ever been transcribed and was part of the court file before he asserted in his, conveniently,

unsworn motion that the error was apparent on the face of the transcript of the sentencing hearing. Given that Petitioner was relying on a transcript which had never been made a part of the record, Petitioner should have ordered it and attached it and/or other relevant documentation supporting the claim to his motion. Without attachments, all the court had to work with were unsworn allegations which were not supported by the extant record. Consequently, the trial court properly denied Petitioner's claim based on the then extant record.

Nor was the trial court required to order the sentencing hearing transcribed in order to attach it to his order of denial. As the Fourth District noted in the instant case, Rule 3.800(a) does not require attachments, in sharp contrast to Rule 3.850 which **expressly** does require attachments.

Moreover, it is well worth noting that the Second District ruled in Williams v. State, 705 So. 2d 1032 (Fla. 2d DCA 1998), that where a determination of the substance of the oral pronouncement is not of record and requires the transcription of the proceedings, such a matter may only be resolved by resort to Rule 3.850. In other words, in reviewing a Rule 3.800(a) motion, a trial court is not required to order transcripts in an effort to substantiate or refute a movant’s claims.

For all the foregoing reasons, the State once again submits

this Court must affirm the decision of the Fourth District Court of Appeal in the instant case and disapprove the decisions of the First District Court of Appeal in Fitzpatrick, the Second District in Watts, and the Fifth District in Berthiaume.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Cynthia Morales, Esquire, Broad and Cassel, 2 S. Biscayne Blvd., 21st Floor, Miami, FL 33131-1806 and to Beverly A. Pohl, Broad and Cassel, 100 S.E. Third Ave., Suite 2700, Fort Lauderdale, FL 33394 on April 5, 2006.

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JEANINE GERMANOWICZ

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

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JEANINE GERMANOWICZ