IN THE SUPREME COURT OF FLORIDA

TROY L. BLOCKER, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC07-2292

ON APPEAL FROM THE COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statement of the case with the following additions and corrections:

Original Plea/Sentencing (February 7, 1989):

Petitioner appeared before Circuit Judge Crockett Farnell on February 7, 1989 to be sentenced based upon a negotiated pleas in three cases; 87-14776, 87-14777, and 87-14778. Petitioner was represented by Ronnie G. Crider, Esq., and the state by Assistant State Attorney William Loughery (R/T8-16)[1]. The written transcript reflects defense counsel advised the court petitioner was scheduled for trial that day. The State had agreed to allow Petitioner, if the court would approve:

> ...[t]o be sentenced on the guideline. My understanding is that Mr. Blocker, under the guideline, would score life in prison for these charges.
>
> Pursuant to our earlier discussion and negotiations, the State will agree to allow the Court to sentence Mr. Blocker out on those guidelines to a term of nine years in the Florida State prison.
>
> * * * *
>
> I spent quite a bit of time with Mr. Blocker at the County Jail. He's read the advisement form, and he understands the rights contained in this form. He's prepared to sign that form at this time, if the court will accept the discussion that we have had with

[1] The hearing was reported by Van Matthews. However, the court reporter's notes were not transcribed until October 1995 and prepared by a different court reporter, Eric French, as reflected in the certification attached to the transcript.

the State

(R/T10-11)

The plea form, signed by the petitioner (R/32) reflects, "The disposition will be 99 years Doc" (emphasis in original)

Petitioner was sworn (R/T11). The prosecutor gave a factual basis for the pleas, indicating: (a) in case **87-14777**, the offenses took place at about 4:00 a.m. on October 21, 1987. Petitioner broke into the home where the victim resided with her three children. He apparently stole the victim's purse, left the house, and took the money out of the purse - about $60. He then went back into the house where he grabbed the victim and threatened he would kill her and her children if she did not cooperate, took her into another bedroom, raped her, and committed oral sex on her against her will. Petitioner admitted breaking into the home twice and committing the sexual battery (R/T12-14); (b) in case **87-14778**, which took place on October 25, 1987 around 7:00 p.m., Petitioner broke into the victim's home. She did not speak English. He had a knife in his possession, forced her on the bed, threatened her with the knife on a number of occasions, and committed a sexual battery upon her against her will. Petitioner also stole about $700 in U.S. currency, $70 dollars in Italian currency, and five rings from her fingers; (c) in case 87-14776, which took place around 9:30 on October 3, 1987, Petitioner broke into the victim's home. The victim was on the telephone. Her daughter was asleep.

Petitioner came into the bedroom with a knife, threatened the victim with violence, and forcibly raped her against her will. Petitioner admitted breaking into the house, stealing about $200, and using a knife in the commission of the rape (R/T14).

The transcript then reflects the following oral pronouncements by the court:

> The Court will accept the plea. I will adjudicate the defendant, sentence him to nine years, Department of Corrections....
>
> (R/T15)

The sentencing guidelines scoresheet reflected Petitioner's guideline sentence was "Life" and that the sentence imposed was "A/G 99 years DOC" (R/31). The judgment and sentencing documents in each case reflect the following: (a) in case **87-14776**, adjudicated guilty of Ct. 1 Burglary (PBL), Ct. 2 Sexual Battery (Life Felony); sentenced on Ct. 1 "99 years," Ct. 2 "99 years" concurrent with Ct. 1 concurrent with 87-14777 & 87-14778 (R/33-37); (b) in case **87-14777,** Ct. 1 Burglary (Fel 2), Ct. 2 Burglary (PBL), Ct. 3 & 4 Sexual Battery (Fel 1); sentenced to Ct. 1 "15 years," Ct. 2 "99 years" concurrent with Ct. 1, Ct. 3 "30 years" concurrent with Ct. 1, Ct. 4 "30 years" concurrent with Ct. 1, all sentences concurrent with 87-14776 & 87-14778 (R/38-44); (c) in case **87-14778** adjudicated guilty of Ct. 1 Burglary (PBL), Ct. 2 Sexual Battery (Life Felony), Ct. 3 Dealing In Stolen Property (Fel 2), sentenced to Ct. 1 "99 years," Ct. 2 "99 years" concurrent with

Ct. 1, Ct. 3 15 years, concurrent with Ct. 1, all concurrent with 87-14776 &87-14777 (R/45-50).

Pro Se Motion To Correct Illegal Sentence (filed October 1994) & Order Granting Motion To Correct Illegal Sentence In Part And Denying In Part And Directing Clerk Of Court To Amend Judgment And Sentence (Dated October 25, 1995):

Petitioner filed a sworn pro se motion to correct illegal sentence in October of 1994 (R/53-64). In that motion, he alleged on February 7, 1989, he plead guilty pursuant to a plea agreement and, "....[t]he lower tribunal sentenced him to a term of ninety-nine (99) years to be served in the Florida Department of corrections" (R/53) . The State filed a response (R/27-51). The court entered an order granting Petitioner partial relief. The court reduced Petitioner's sentences on Ct. 2 of 87-14776 (Sexual Battery) [Life Felony] and Ct. 2 of 87-14778 (Sexual Battery) [Life felony] to 40 years imprisonment (R/T25-26).

Pro Se "Petition For Writ Of Habeas Corpus And/Or Motion To Correct Illegal Sentence" (Filed October 28, 2005; dated October 25, 2005):

On October 25 2005, Petitioner filed a pro se "Petition For Writ Of Habeas Corpus And/Or Motion To Correct Illegal Sentence" with attachments (R/3-16). Petitioner alleged in cases 87-14776, 87-14777, and 87-14778 he was convicted and sentenced on February 7, 1989, "...[t]hree counts of aggravated battery" and received three separate '9 year' prison terms, each to be served concurrent. The written documents reflect "99 year" terms but the transcript shows Petitioner was sentenced to "9 year." (R/3). Petitioner

alleged no evidentiary hearing is required, that he written sentences must conform with the oral pronouncement and that the court cannot change the orally pronounced sentenced even if based upon a mistake (R/T4-5).

The State filed a response with attachments (R/22-64). The response was filed by Assistant State Attorney William A. Loughery, the same prosecutor who represented the State at the original plea/sentencing hearing on February 7, 1989 (see plea/sentencing transcript) (R/T8-16). The response argued the plea/sentencing transcript of the hearing on February 7, 1989 was filed on October 10, 1995 containing a "scrivener's error." "...[C]ourt Reporter obviously mis-transcribed 'ninety-nine' to just 'nine'" (R/22). He argued:

> The oral pronouncement in Court was a Sentence of ninety-nine years. The transcript is capable (as in this case) of being in error. Analysis of the record in total shows that the DEFENDANT is misrepresenting the truth to this Court.
>
> (R/22)

In support of his argument the transcript was in error and the oral sentence pronounced was 99 years, not 9 years reflected in the transcript, the State's response points out the following:

a. Assistant State Attorney, William Loughery, was present at the change of plea and that the seriousness and significance of the charges are apparent from the factual recitation in the plea transcript; that Attorney Loughery asserted:

> ...[h]as a specific memory of the plea negotiations. The Defendant scored life on the guidelines and was allowed to plead to ninety-nine years. A nine year sentence is absurd under the facts. Your undersigned has a specific recollection that the Court sentenced the DEFENDANT to ninety-nine years. You undersigned also spoke with defense Attorney Ronnie Crider, who specifically remembers the case and confirmed the ninety-nine year sentence by the court.
>
> (R/22-23)

b. The plea form signed by Petitioner indicated a 99 year sentence, which is consistent with the judgment and sentence (R/23).

c. The Petitioner himself knew the sentence was properly 99 years as illustrated by an earlier pro se motion to correct illegal sentence filed in October 1994. The motion was written and sworn to by Petitioner. In the motion, Petitioner stated he "pled guilty pursuant to a plea agreement and the lower court sentenced him to a term of ninety-nine years to be served in the Florida Department of Corrections." There was no mention of a 9 year sentence in that motion. If it were true, it would have been raised at the time not 16 years later (R/23).

The State in its response concluded Petitioner was improperly attempting to take advantage of an obvious error by the court reporter. It was maintained that the Petitioner must show what was "actually" said at the change of plea and that he transcript is not absolute proof especially in light of the contrary evidence on the

record (R/23).

The petitioner filed a pro se reply (R/65-74). He argued a scrivener's error is a mistake in the written sentence that is at variance with the oral pronouncement but not those errors that are the result of a judicial determination, citing Ashley v. State, 850 So. 2d 1265, fn3 (Fla. 2003). Additionally, Petitioner argued even assuming there was a mistake, the "...rule which authorizes a sentencing court to correct an illegal sentence does not permit the court to increase a legal unambiguous sentence after the pronouncement has become final even if the orally pronounced sentence was based on mistake." , citing Comtois v. State, 891 So. 2d 1131 (Fla. 5th DCA 2005) (R/66).

Petitioner alleged the "9 year" term was referenced several times in the hearing transcript and all parties agreed at all times to the imposition of three concurrent 9 year terms. According to Petitioner, it is not believable that parties misspoke in many different places in the transcript (R/66).

Petitioner urged as hearsay the prosecutor's assertion that he it spoke with Petitioner's former defense counsel who confirmed it was a 99 year sentence. Even if defense counsel had so stated, Petitioner maintained, such was it is irrelevant because the oral pronouncement controls mistakes (R/66).

In response to the State's intimations Petitioner was misrepresenting or lied in the current motion or prior 1994 motion,

Petitioner denied committing perjury. Even if he had, Petitioner asserts the State was on notice as of October 10, 1995 (the date the transcript was filed) and under the statute of limitations, the time for filing perjury charges has lapsed (R/67). He asserted that since the transcript was in the State's possession since October 10, 1995, the State should have moved to fix the mistake (R/67).

Finally, Petitioner, in response to what he called the State's "grumbles" (R/67) about Petitioner having waited 16 years to file the instant claim, cited the case of Young v. State, 619 So. 2d 378 (Fla. 2d DCA 1993), in which it was held a motion seeking correction of an illegal sentence may be filed at any time even where it took defendant 18 years to discover the claim. (R/67)

On January 27, 2006, the postconviction court rendered a summary "Order Denying Defendant's Motion To Correct Illegal Sentence" with attachments (R/75-123). The postconviction court found that:

a. The sentencing transcript states Petitioner was to receive a guideline sentence, citing to the hearing transcript attached as Exhibit 4 to the order, "See Exhibit 4: Sentencing Transcript, p. 3, lns.23-25, p4.,lns 1-2." (R/76)[2].

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[2] On page 3 of the cited transcript, defense counsel stated,"Pursuant to our earlier discussion and negotiations, the State will agree to allow the Court to ***sentence Mr. Blocker out on those guidelines*** to a term of nine years in the Florida State Prison" (R/T99-100). (emphasis added by respondent)

On that same page defense counsel previously stated, "....We

b. On the sentencing scoresheet, Petitioner scored a life sentence under the guidelines, citing to the guidelines scoresheet attached as Exhibit 5 to the order (R/76)[3].

c. Both the scoresheet and the plea form indicate Petitioner is to be sentenced to a term of 99 years in prison, citing the Exhibit 5 scoresheet and Exhibit 6 Plea form (R/76)[4].

d. While a 9 year sentence would have been a downward departure, none of the documentation indicates Petitioner received a downward departure and no reasons for a downward departure are stated in any documentation or in the sentencing transcript (R/76).

e. Petitioner previously filed a motion to correct illegal sentence wherein he concedes the court sentenced him to a term of 99 years in prison, citing to Exhibit 7 attached to the order (R/76)[5]

The postconviction court made a finding, based upon the facts

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have discussed a disposition in this case, whereby the State has agreed to allow Mr. Blocker – if the Court will accept this disposition - ***to be sentenced on the guideline***. My understanding is that Mr. Blocker, under the guideline, would score life in prison on these charges" (R/T99) (emphasis added by respondent)

[3] His guidelines scoresheet bore the following "Guidelines Sentences Life" (R/107).

[4] Scoresheet reflects "Sentences imposed" "A/G 99 years DOC..." (R/107); Plea form reflects "The disposition will be 99 years DOC" (R/108).

[5] As noted therein, the Petitioner in his October 1994 pro se 3.800 (a) motion stated in paragraph 1: "On February 7, 1989, Blocker pled guilty under a plea agreement and the lower court sentenced him to a term of 99 years F.S.P" (R/109)

summarized above, that the sentencing transcript clearly contained a scrivener's error and that the trial court had orally pronounced a 99 year term as indicated in the written judgment and sentences (R/76).

The postconviction court further found because the instant claim was filed pursuant to Fla. R. Crim. P. 3.800(a) and because a rule 3.850 motion is time barred, it would be improper to conduct an evidentiary hearing on this case, citing to Burgess v. State, 831 So. 2d 137, 141 (Fla. 2002) (noting motions filed under Rule 3.800(a) are limited to those issues which can be resolved as a matter of law without an evidentiary hearing).

Additionally, the postconviction court determined even if an evidentiary hearing were conducted, it was unlikely any evidence helpful to resolving the claim would be brought out as the court reporters are only required to keep their notes for 10 years from the date of the proceeding pursuant to Fla. R. Jud. Admin. 2.075(f)(2). Petitioner was sentenced on February 7, 1989, nearly 17 years before he filed this instant motion (R/76-77).

The postconviction court found also Petitioner's claim was barred by the doctrine of laches. The court found Petitioner was present when he was sentenced and was aware of the sentences orally pronounced. If the trial court were to accept his contention to be true, Petitioner has known for nearly 17 years that the written judgments and sentences do not conform to the orally pronounced

sentences. Despite waiting this long period of time to raise the instant claim, Petitioner offers no reason for his delay. The court found the delay to be unreasonable. Due to the delay, the court reporter's records are likely destroyed. It would be unduly burdensome, if not impossible, to determine the accuracy of the transcript. The court determined the claim was barred, citing to Wright v. State, 711 So. 2d 66, 67-68 (Fla. 3d DCA 1998); Bartz v. State, 740 So. 2d 1243, 1244-45 (Fla. 4th DCA 1999); McCray v. State, 6899 So. 2d 1366, 1368 (Fla. 1997); and, Hogan v. State, 884 So. 2d 538, 539 (Fla. 2d DCA 2004) (R/76).

Appellate Proceedings in the Second District Court of Appeals:

Petitioner filed a timely notice of appeal and brief on February 17, 2006 (R/127;130-138). An order to show cause was entered by the second district (R/139). A response was filed by the State of Florida (R/142-160). Petitioner filed a pro se reply (R/161-165).

On November 16, 2007, the Second District entered its opinion in Blocker v. State, 968 So. 2d 686 (Fla. 2d DCA 2007) (R/167-182). Judge Altenbernd authored the opinion. The appellate court noted that in Williams v. State, 957 So. 2d 600(Fla. 2007), this Court held a claim asserting a discrepancy between the oral and written sentence is an "illegal sentence" and cognizable at any time under a rule 3.800(a) motion. This Court stated therein, "...[t]his procedural rule allows for a petition to the courts to correct

sentencing errors that may be identified on the face of the record and, because such errors may be resolved as a matter of law, do not require evidentiary hearings." Blocker. *supra*, at 687, citing Williams, 957 So. 2d at 602. The Second District reasoned that this Court by concluding such an issue may be decided "as a matter of law" effectively equated the content of the written transcript with the oral pronouncement. But as the Blocker case demonstrates, the two may not always be equivalent. Blocker, at 688.

The Second District noted the instant case is different because the State presented documentation which reasonably called into question the accuracy of the transcript and presented a factual issue as to whether the sentences orally pronounced were sentences totaling 9 years or sentences totaling 99 years. Blocker, at 688. The Second District then reasoned:

> Although the **issue presented is clearly a question of fact and not one of law**, like the trial court, we are entirely convinced that the transcript in this case contains an error and that the written sentences do not.
>
> Blocker, at 688.

The Second District was unwilling to extend the reasoning in Williams, *supra* to reverse the written sentences in this case. The Second District was also of the opinion it could not devise a method by which the court could actually determine which of the written documents is an accurate reporting of the oral pronouncement without conducting an evidentiary hearing. Under these cir-

cumstances, the issue is a factual one requiring an evidentiary hearing, and thus not cognizable under rule 3.800(a). Blocker, at 688.

The Second District ruled the trial court was entitled to reject Blocker's claim, holding:

> *...[a]t least when the State demonstrates a reasonable basis to contest the accuracy of a transcript of a sentencing hearing and thereby creates a disputed question of fact, a conflict between a written sentence and a written transcript is a factual issue that must be resolved under Florida Rule of Criminal Procedure 3.850. Here a reasonable basis was established by review of the plea form and other sentencing documents of record that support the validity of the sentencing documents. Because Mr. Blocker is well beyond the two-year time limit for filing a rule 3.850 motion and because he was present at the sentencing hearing to hear the oral pronouncement and his claim does not otherwise involve any newly discovered evidence, this specific claim is time barred.*
> Blocker, at 688.

The Second District Court then certified the following question to this Court as a matter of great public importance:

> IF A DEFENDANT FILES A POSTCONVICTION MOTION MORE THAN TWO YEARS AFTER THE FINALITY OF HIS SENTENCES ALLEGING A CONFLICT BETWEEN THE SENTENCES STATED IN HIS WRITTEN SENTENCES AND THOSE CONTAINED IN THE WRITTEN TRANSCRIPT, AND IF THE STATE REASONABLY CONTESTS THE ACCURACY OF THE TRANSCRIPT.
>
> (1) MUST THE TRIAL COURT RULE IN FAVOR OF THE DEFENDANT AS A MATTER OF LAW BECAUSE THE TRANSCRIPT CONTROLS THE ISSUE,
>
> (2) MUST THE TRIAL COURT CONDUCT AN

> EVIDENTIARY HEARING PURSUANT TO RULE 3.800(a) TO DETERMINE WHICH DOCUMENT ACCURATELY REFLECTS THE TRIAL JUDGES ORAL PRONOUNCEMENT, OR
>
> (3) MAY THE TRIAL COURT DENY THE MOTION AS AN UNTIMELY REQUEST FOR RELIEF PURSUANT TO RULE 3.850.
>
> Blocker, at 688-689.

After reviewing the history of the case in detail, Blocker, at 689-691, the Second District then divided its reasoning into distinct parts:

"DEFINING 'ORAL PRONOUNCEMENTS'"

The Second District recognized the long line of cases holding the oral pronouncement of a sentence controls over a written sentence. Blocker, at 691. The district court noted in many cases the rule applies when the written sentence contains terms that were not announced in open court as reflected in the written transcript. The court then stated, "It is not obvious that this rule applies so clearly in cases in which the transcript itself may contain an error." *Id.* The district court reasoned none of the methods of recording the "oral pronouncement" of the trial court, which the district court defined in physics meaning "a transitory collection of sound waves" as being foolproof - the court reporter's tape from which a transcript was prepared or the clerks documents - "seems foolproof." *Id.* The court then stated:

> Given the other documents suggesting that the parties anticipated sentences totaling 99 years, we see no reason to elevate the written

> transcript over the written sentence as the approved recording of the sounds containing the oral pronouncement. In this case there is clearly a factual dispute as to who is the better historian: the clerk of the court who prepared the written sentences shortly after the oral pronouncement of sentence, or the court reporter who transcribed the hearing years later from notes crested by a different court reporter.
>
> Blocker, *Id.*

"UNDER THESE CIRCUMSTANCES, RULE 3.800(A() IS NOT SUITABLE"

The district court noted that in Ashley v. State,850 So. 2d 1265 (Fla. 2003) [where the court held the oral pronouncement controls over a written sentence], Justice Parents observed, "I now recognize that an error in an oral pronouncement cannot properly be labeled as scrivener's error." Ashley, at 1269. The district court in Blocker added the error was made by the trial judge not the transcriptionist - the judge intended to sentence Ashley as a habitual violent felony offender but omitted the word violent when announcing the sentence. Blocker, at 692.

The district court noted that even in Williams, this Court appeared to acknowledge a discrepancy between the oral pronouncement and the written sentence may sometimes require further explanation before a court accepts the oral pronouncement as the proper sentence, citing to Williams, 957 So. 2d at 605, n2 noting the trial court may direct the State to respond to such an allegation so the state "may have an opportunity to explain any apparent discrepancy before the matter is adjudicated." Blocker, at

692. The district court then reasoned, “A court reporter’s error in a transcript is akin to those errors we consider to be scrivener’s errors when made in the records of a court by mistake of a court reporter.” *Id.*

The district court concluded the only way to determine whether both Petitioner’s trial counsel and the trial court judge said “9" or “99" would be to take testimony from the people in the courtroom on February 7, 1989 or perhaps to find a tape recording. The passage of time will effect the availability and quality of any such evidence. The district court noted if this were a civil claim on an oral contract it would have been barred by the statute of limitations many years ago. *Id.*

The district court noted the sentences do not depart from the written contract contained within the negotiated plea, *id.*, and further reasons in a footnote that the existence of a written plea agreement which the conflicts with Petitioner’s allegations militates against providing relief pursuant to rule 3.800(a) where generally a defendant seeking a correction of a sentence in contravention of the plea agreement must seek to withdraw his plea pursuant to rule 3.850 providing the State with an opportunity to withdraw from the agreement if it objects to resentencing. Id., n. 12.

The district court cited to Calloway v. State, 658 So. 2d 983, 988 (Fla. 1995), for the legal proposition, “In order for a

sentence to be 'illegal' for the purposes of correction under rule 3.800(a) at any time, the claim must be resolvable as a matter of law without an evidentiary hearing." Blocker, at 692. The district court added most of the distinctions between a motion for relief under rule 3.850 and rule 3.800(a) would seem to collapse if defendants were allowed to challenge and resolve factual disputes under a rule 3.800(a) concerning statements of trial judges and other parties at a sentencing hearing. *Id.*

The district court reasoned while a discrepancy between the written sentence and the transcript may be challenged under a rule 3.800(a) motion when the State either concedes or fails to allege an error in the sentencing transcript, this Court recognized in Williams, 957 So. 2d at 605, n.2, such a discrepancy is sometimes subject to explanation. The State is entitled to respond to a rule 3.800(a) alleging a discrepancy. The district court holds:

> If the State provides, or if the trial court's review of the court records reveal, a reasonable basis to believe that the discrepancy in the transcript and the sentencing documents presents a factual issue at to the court's oral pronouncement of sentence, the matter cannot be resolved by a rule 3.800(a).
>
> Blocker, 968 So. 2d at 693

The district court recognized in theory that the state attorney could contest a discrepancy claim to enforce an erroneous written sentence, but the court was inclined to believe the state attorney with this district both as officers of the court and as

constitutional officers would not so abuse their authority. They would feel honor-bound to concede any clear error or injustice in the sentencing process. Blocker, at 693-694.

The district court concluded that there was every reason to believe the written sentence in the instant case was accurate and the transcript was in error, concluding that such postconviction disputes can be resolved only after an evidentiary hearing and by motion filed pursuant to rule 3.850. Blocker, at 694.

"THE RIGHT RESULT"

The district court found the trial court correctly denied relief. The appellate court reasoned after a response was filed by the State, the matter became a contested issue of fact that could not be resolved under the procedures of rule 3.800(a). Since the motion had not been filed within 2 years from the finality of the judgment and sentences or even within two years from the preparation of the transcript in 1995, there was no question the motion was untimely if treated as filed pursuant to rule 3.850. It had no possibility of being amended to cure this problem. *Id.*

The district court then concluded:

> ...[t]he trial court should have denied the motion explaining that it was not cognizable under rule 3.800(a). To the extent that the trial court purported to decide a contested issue of fact in its order without an evidentiary hearing, that reasoning was incorrect.
>
> Blocker, *Id.*

SUMMARY OF THE ARGUMENT

Certified Questions: IF A DEFENDANT FILES A POSTCONVICTION MOTION MORE THAN TWO YEARS AFTER THE FINALITY OF HIS SENTENCES ALLEGING A CONFLICT BETWEEN THE SENTENCES STATED IN HIS WRITTEN SENTENCES AND THOSE CONTAINED IN THE WRITTEN TRANSCRIPT, IF THE STATE REASONABLY CONTESTS THE ACCURACY OF THE TRANSCRIPT.

(1) MUST THE TRIAL COURT RULE IN FAVOR OF THE DEFENDANT AS A MATTER OF LAW BECAUSE THE TRANSCRIPT CONTROLS THE ISSUE

The answer is "no." The transcript is merely evidence of what sentence was in fact orally pronounced by the trial court. The issue is a dispute of fact, namely, whether the trial court orally pronounced a sentence of 9 years or 99 years.

(2) MUST THE TRIAL COURT CONDUCT AN EVIDENTIARY HEARING PURSUANT TO RULE 3.800(a) TO DETERMINE WHICH DOCUMENT ACCURATELY REFLECTS THE TRIAL JUDGES ORAL PRONOUNCEMENT

The answer is "no." The subject matter of a rule 3.800(a) is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary hearing. Evidentiary hearings are not available under rule 3.800(a) to resolve disputes of facts.

(3) MAY THE TRIAL COURT DENY THE MOTION AS AN UNTIMELY REQUEST FOR RELIEF PURSUANT TO RULE 3.850.

The answer is "yes." Petitioner was present at the sentencing hearing in 1989 and was obviously aware of what sentence was "orally pronounced" by the trial court. Petitioner himself alleged in two prior pro se 3.800(a) motions - in 1994 and 2000 - he was

sentenced to 99 years by the trial court. There is no reason why he could not raise the factual issue -- whether the trial court “orally sentenced” him to 9 years or 99 years - within 2 years under rule 3.850, instead of waiting 16 years to raise this issue for the first time. His claim is time barred under rule 3.850.

ARGUMENT

Standard of Review: The standard of review of the legal conclusions of the district court of appeals is a de novo review.

I. IF A DEFENDANT FILES A POSTCONVICTION MOTION MORE THAN TWO YEARS AFTER THE FINALITY OF HIS SENTENCES ALLEGING A CONFLICT BETWEEN THE SENTENCES STATED IN HIS WRITTEN SENTENCES AND THOSE CONTAINED IN THE WRITTEN TRANSCRIPT, AND IF THE STATE REASONABLY CONTESTS THE ACCURACY OF THE TRANSCRIPT.

(1) MUST THE TRIAL COURT RULE IN FAVOR OF THE DEFENDANT AS A MATTER OF LAW BECAUSE THE TRANSCRIPT CONTROLS THE ISSUE?

The answer is "no." While certified transcripts may be "presumed" to be correct and accurate, Respondent submits such a presumption is, at best, a rebuttable presumption.

Respondent acknowledges the law is clear and unequivocal the oral pronouncement of sentence controls over a written sentence. As this court stated in Ashley v. State, 850 So. 2d 1265, 1268 (Fla. 2003), "...[w]ritten sentences are usually just a record of the actual sentence required to be pronounced in open court. Thus, when conflict arises between the written sentence and the oral pronouncement, the oral pronouncement prevails." However, as Judge Altenbernd cogently points out in the opinion under review, while case law often equates the oral pronouncement and the ***written transcript*** without discussion, in the instant case, it is the written transcript being questioned. Blocker v. State, 968 So. 2d

686 at 691 (Fla. 2d DCA 2007). The transcript itself is nothing more than a document "reflecting" what was orally pronounced. It is not the actual oral pronouncement, which as "merely a transitory collection of sound waves". *Id.* Neither the court reporter's taped notes, which in the instant case were not transcribed until 1995 by a different court reporter, nor the court clerk's written sentencing documents [the court clerk also being present and hearing what was orally pronounced] are "foolproof" methods of determining what was in fact actually orally pronounced by the trial court since both methods of recording what was actually said is capable of human error. *Id*.

As Judge Atenbernd aptly stated:

> In this case, the State's position is that the judge did not misspeak, but that the court reporter was inaccurate. A court reporter's error in the transcript is akin to those errors we consider to be scrivener's errors when made in the records of a court by the mistake of a court employee.
>
> Blocker, Id. at 692

The district pointed to the presence of other documents suggesting the parties anticipated sentences totaling 99 years, namely: the plea form which reflects a disposition of 99 years; the guidelines scoresheet reflecting a recommended sentence of life; the judgment and sentencing documents reflecting 99 year concurrent terms; and the petitioner's own pro se 3.800(a) motion filed in 1994 in which he alleged that he"pled guilty pursuant to a plea

agreement and the lower tribunal sentenced him to a term of 99 years. Blocker *id*. at 689-690

Respondent would further point out that the scoresheet further reflected "Sentence imposed" was "A/G 99 years DOC..."(R/107); the written plea agreement which reflected "The disposition will be 99 years DOC" (R/108); and in another pro se 3.800(a) motion filed in 2000, Petitioner stated, "1. On February 7, 1989, Defendant pled guilty under a plea agreement and the lower tribunal sentenced him a term of 99 years..." and "3. At sentencing, **the court orally pronounced that Blocker was being sentenced to 99 years...**" (R/110-111) (bold emphasis added).

The Second District saw no reason to elevate the written transcript over the written sentences as the approved recording of sounds containing the oral pronouncement. *Id.* at 991. *See also* Judge Altenbernd's reasoning in his dissenting opinion in Simon v. State, 793 So. 2d 980, 982 (Fla. 2d DCA 2001):

> In collateral proceeding where we purport to allow the oral sentence to control over the written sentence years after the hearing, the truth is that we are relying upon the accuracy of the court reporter over the accuracy of the court clerk. I see no particular reason why we should do this in every case. This type of case presents a factual question concerning whether the clerk or court reporter was the more accurate scrivener at thesentencing hearing.

In Petitioner's case, the transcript indicates defense counsel stated, "...[t]he State has agreed to allow Mr. Blocker – if the

Court will accept this disposition – to be sentenced on the guideline. My understanding is that Mr. Blocker, under the guideline, would score life in prison for these charges." (R/T99). Additionally, as the trial court noted in its order denying the 3.800(a) motion, while the sentence of 9 years would have been a downward departure, none of the court documents indicate Petitioner received a downward departure sentence and no reasons for departure are stated in the documents or the written transcript (R/76).

Petitioner's characterization of theState's argument the transcript is inaccurate as a "cavalier assumption" (Peti-tioner's brief at p. 15) is uncalled for and without merit, as is Petitioner's argument the state's response arguing the transcript was inaccurate "only offers conjecture and supposition" (Peti-tioner's brief at p. 25). The state's argument included a statement by Assistant State Attorney William Loughery, who drafted the response, was present for the change of plea in 1989. As he pointed out, the seriousness and significance of charges are apparent from the factual recitation. Said prosecutor "[h]as a specific recollection that the Court sentenced the DEFENDANT to ninety-nine years." He spoke with defense counsel, Ronnie Crider, who also "specifically remembers the case and confirmed the ninety-nine year sentence by the Court." (R/22-23). Furthermore, Att. Loughery argued in his response that the Petitioner himself in an earlier pro se 3.800(a) acknowledged he was sentenced to 99 years.

Attached to his response is a pro se motion previously filed by Petitioner in 1994, wherein Petitioner stated *under oath* he, "..[p]led guilty pursuant to a plea agreement and the lower tribunal sentenced him to a term of ninety-nine (99) years" (R/22;53). The trial court, in its order denying the 3.800(a) motion, added an additional document, another pro se 3.800(a) motion filed in 2000 wherein Petitioner stated, "...[t]he lower tribunal sentenced him to a term of 99 years F.S.P." (R/109) and, "At sentencing, the court **orally pronounced that Blocker was being sentenced to 99 years**..." (R/110)(bold emphasis added). Under the totality of circumstances, the postconviction court did not err in summarily denying the Petitioner's claim which relied solely upon a transcript that was properly challenged by the correct as being an inaccurate reflection what sentenced was actually"orally pronounced by the trial court. The Second District was also correct in stating, "We conclude that the executed plea agreement and sentencing scoresheet provide a reasonable basis in this case to conclude that a factual question exists regarding the court's oral pronouncement. Blocker, *supra* at 693.

II. IF A DEFENDANT FILES A POSTCONVICTION MOTION MORE THAN TWO YEARS AFTER THE FINALITY OF HIS SENTENCES ALLEGING A CONFLICT BETWEEN THE SENTENCES STATED IN HIS WRITTEN SENTENCES AND THOSE CONTAINED IN THE WRITTEN TRANSCRIPT, AND IF THE STATE REASONABLY CONTESTS THE ACCURACY OF THE TRANSCRIPT.

(2) MUST THE TRIAL COURT CONDUCT AN EVIDENTIARY HEARING PURSUANT TO RULE 3.800(A) TO DETERMINE WHICH DOCUMENT ACCURATELY REFLECTS THE TRIAL JUDGE'S ORAL PRONOUNCEMENT?

The answer is "no." While Fla. R. App. P. 9.141(b)(2)(D) states in pertinent part:

> **(b) Appeals from Post-Conviction Proceedings Under Florida Rule of Criminal Procedure 3.800(a), 3.850, or 3.893**
>
> * * * *
>
> (D) On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.

This Court has consistently interpreted rule 3.800(a) as applying only to cases that do not require evidentiary hearings.

As this Court most recently stated in Williams v. State, 957 So. 2d 600, 603 (Fla. 2007), "...[r]ule 3.800(a) encompasses any sentencing discrepancy apparent on the face of the record that may be resolved as a matter of law ***without the need for an evidentiary hearing to resolve issues of fact***." *See also* State v. Callaway, 658 So. 2d 983, 988 (Fla. 1995) "[a]n illegal sentence is one that the exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. A rule 3.800(a) can be filed at any time, even decades after the sentence has been imposed, and as such, ***its subject matter is limited to those sentencing issues that can be resolved as a matter of law without***

an evidentiary hearing.". *See also* Hopping v. State, 708 So. 2d 263, 265 (Fla. 1998) ***"[w]here 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(a)."

Here, Petitioner is not entitled to an evidentiary hearing because his claim is untimely and based upon a dispute of fact not a matter of law apparent on the face of the record. His reliance on Harmon v. State, 503 So. 2d 1250 (Fla. 1987) will not improve the procedural posture of his claim. In Harmon, the claimed error was one of ineffective assistance of counsel claim, and was brought under rule 3.850, which specifically provides for an evidentiary hearing, pursuant to rule 3.850(d). Further such claims must be filed within 2 years after the judgment and sentences become final pursuant to rule 3.850(b). His reliance on Townsend v. State, 927 So. 2d 1064 (Fla. 4th DCA 2006) is also misplaced as such addressed a motion to withdraw plea after sentencing under rule 3.170(l), which must be filed within 30 days after rendition of sentence.

The fact the original trial judge, the Honorable Crockett Farnell may be available to testify is as the original Assistant State Attorney William Loughery and the original defense attorney Ronnie Crider may be available to testify is not relevant because Petitioner is not entitled to an evidentiary hearing under rule 3.800(a). He is time barred from seeking relief under rule 3.850.

The state did not "merely suggest" the transcript was erroneous, but cited to and attached specific documents which clearly bring the accuracy of the transcript into question. Moreover, it cannot be overemphasized that Petitioner himself was present at the plea/sentencing hearing in 1989 and was obviously aware what the judge "orally sentenced" him to at that time. Even more interesting is the fact Petitioner himself alleged *under oath* in his first pro se 3.800(a) motion filed in 1994, "...[t]he lower tribunal sentenced him to a term of ninety-nine years..." (R/112). In his second 3.800(a) motion filed in 2000, he alleges again, "1. On February 7, 1989, Defendant pled guilty under a plea agreement and the lower tribunal sentenced him a term of 99 years..." and "3. At sentencing, **the court orally pronounced that Blocker was being sentenced to 99 years...**" (R/110-111) (bold emphasis added)]. Under such circumstances, for Petitioner to even attempt to cast doubt on the veracity, credibility or memory of the prosecutor is particularly disingenuous.

To be clear, respondent is not seeking an evidentiary hearing per se. It is the Petitioner who is seeking relief based upon an asserted claim that he was orally sentenced by the trial court to 9 years imprisonment and not 99 years as reflected in the judgment and sentencing documents. Petitioner alleges the oral pronouncement was "9 years" and the written sentences inaccurately reflect "99 years." Petitioner relies on the transcript of the plea/sentencing

hearing it stating the sentence imposed was ”9 years.” Respondent clearly placed into question the accuracy of the plea/sentencing transcript as to what sentence was actually “orally pronounced by the court.” *This was and always has been not a question of law but a dispute of fact*. What sentence was actually “orally pronounced by the trial court is a question of fact and as such cannot be determined from the face of record and requires an evidentiary hearing. Evidentiary hearing are not available in rule 3.800(a) proceedings and Petitioner is time barred from seeking relief under rule 3.850.

The dispute of fact is genuine, given the documentation in the court file including Petitioner’s own prior 3.800(a) motions first in 1994 wherein he stated under oath, “...[t]he lower tribunal sentenced him to a term of ninety-nine years” (R/112) and again in 2000 wherein he alleges, “...[t]he court orally pronounced a sentence that Blocker was being sentenced to 99 years...” (R/110). The prosecutor’s statement he was present at the plea/sentencing hearing and has, “...[a] specific recollection that the Court sentenced DEFENDANT to ninety-nine years” (R23). He has spoken to defense trial counsel, “...[w]ho specifically remembers the case and confirms the ninety-nine year sentence...” (R/23) - a evidentiary hearing is needed.

Because an evidentiary hearing is needed to determine a question of fact, to wit: what was the sentence orally pronounced

by the trial court - was it “9 years” or “99 years” - and not an issue of law as the state readily acknowledges the oral pronouncement controls over the written sentence, Petitioner’s claim cannot be resolved under a rule 3.800(a) as a matter of law motion but requires an evidentiary hearing, which can only be brought under a timely filed rule 3.850 motion. Petitioner is now precluded by rule 3.850 time limitation from obtaining an evidentiary hearing on his claim.

III. IF A DEFENDANT FILES A POSTCONVICTION MOTION MORE THAN TWO YEARS AFTER THE FINALITY OF HIS SENTENCES ALLEGING A CONFLICT BETWEEN THE SENTENCES STATED IN HIS WRITTEN SENTENCES AND THOSE CONTAINED IN THE WRITTEN TRANSCRIPT, AND IF THE STATE REASONABLY CONTESTS THE ACCURACY OF THE TRANSCRIPT.

(3) MAY THE TRIAL COURT DENY THE MOTION AS AN UNTIMELY REQUEST FOR RELIEF UNDER RULE 3.850?

The answer is “yes.” Respondent asserts that Petitioner’s motion can be denied as untimely under the two year time limitation of rule 3.850. Petitioner reargues that he is entitled to an evidentiary hearing under rule 3.800(a). Since Petitioner was present at his own sentencing hearing back in 1989, he obviously was aware of what sentence was in fact “orally pronounced” by the trial court, there is no reason why Petitioner could not have raised the factual dispute of the alleged failure of the written sentencing documents to conform to the “oral pronouncement” of

sentence within two years of 1989 sentencing hearing. Not only did Petitioner wait 16 years to raise this alleged factual dispute, he even admitted in his own prior pro se 3.800(a) motions the trial court did sentence him to 99 years imprisonment!

In response to Petitioner's rearguing his right to an evidentiary hearing, Respondent re-adopts and re-asserts its argument as set froth above regarding certified question II.

Petitioner argues the district court's decision if an evidentiary hearing is required, the motion is converted to a rule 3.850 motion and subject to the 2 year limitation of rule 3.850 ignores the language of rule 3.800, overlooks the nature of Petitioner's claim and misinterprets Williams v. State, 957 So. 2d 660 (Fla. 2007).

Contrary to Petitioner's argument Williams, *id.*, does not foreclose an evidentiary hearing, this Court stated in Williams v. State, *id.* 603 (Fla. 2007), "...[r]ule 3.800(a) encompasses any sentencing discrepancy apparent on the face of the record that may be resolved as a matter of law ***without the need for an evidentiary hearing to resolve issues of fact***." *See also* State v. Callaway, *supra* 988 (Fla. 1995) "[a]n illegal sentence is onethat the exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." A rule 3.800(a) can be filed at any time, even decades after the sentence has been imposed. As such, ***its subject matter is limited to those***

sentencing issues that can be resolved as a matter of law without an evidentiary hearing.". *See also* Hopping v. State, *supra* 265 (Fla. 1998) ***"[w]here 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(a)."

Contrary to Petitioner's suggestion, this Courts comment in Williams, *supra* 605, n2, "It is also within the trial court's authority to direct the State to file a response to a rule 3.800(a) motion so that the State may have an opportunity to explain an apparent discrepancy before the matter is adjudicated" is not the same thing as authorizing an evidentiary hearing. Such a response is a written pleading and does not involve an evidentiary hearing where sworn testimony is required.

Petitioner's attempt to rely on Bover v. State, 797 So. 2d 1256, 1251 (Fla. 2001) for the proposition an evidentiary hearing may be necessary in a 3.800(a) motion is without merit. This court held in Bover, *id.,* "the adjudication of a defendant as habitual offender when the requisite sequential felonies do not exist may be corrected as an illegal sentence pursuant to 3.800(a) so long as the error is apparent from the face of the record."

While the Second District has recognized the use of evidentiary hearings to resolve questions concerning whether a court reporter's accurately reported the sentence, Enchautequi v.

State, 749 So. 2d 550 (Fla. 2d DCA 2000) was a direct appeal case not a rule 3.800(a) motion. As the Second District said in Blocker, *supra* at 692, "At least on direct appeal, there are cases in which possible error in the transcript of the sentencing hearing has resulted in a remand to the trial court to determine whether the written transcript reflected the true oral argument. *See e.g.* in Enchautequi v. State, 749 So. 2d 550 (Fla. 2d DCA 2000). It is not so obvious however, such relief should be granted in a postconviction proceeding filed many years after the sentencing hearing." The cases of Ellis v. State, 816 So. 2d 759 (Fla. 4th DCA 2002) and Mosely v. State, 659 So. 2d 1342 (Fla. 5th DCA 1995) were also direct appeal cases and not a 3.800(a) motion filed years after the sentencing hearing.

Petitioner's reliance on United States v. Bergmann, 836 F.2d 1220 (9th Cir. 1988) is also without merit. Bergmann's claim was made pursuant to Fed. R. Crim. P. 36, which as the federal circuit court stated, "..[e]nvisions that the district court will make a factual finding...". Under Florida law, as respondent has maintained herein, disputes of fact requiring an evidentiary hearing cannot be brought under a rule 3.800(a) motion.

The issue is a dispute of fact not a question of law. Petitioner alleges the oral pronouncement was 9 years and that the written sentences inaccurately reflect 99 years. Petitioner relies on the transcript of the plea/sentencing hearing. It states the

sentence imposed was “9 years.” Respondent clearly placed into question the accuracy of the plea/sentencing transcript as to what sentence was actually “orally pronounced by the court.” The issue is a dispute of fact - “What was the sentence orally pronounced by the trial court?” Because an evidentiary hearing is needed to determine a question of fact, to wit: what was the sentence orally pronounced by the court “9 years” or “99 years” - not an issue of law as the state readily acknowledges the oral pronouncement controls over the written sentence - Petitioner’s claim cannot be resolved under a rule 3.800(a) motion but requires an evidentiary hearing, which can only be brought under a timely filed rule 3.850 motion. Because the Petitioner is time barred from seeking relief under rule 3.850, he is not entitled to an evidentiary hearing.

CONCLUSION

Respondent respectfully requests this Honorable Court approve the opinion of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. mail to Steven L. Brannock, Esq., Holland & Knight LLP, P.O. Box 1288, Tampa, Florida 33601-1288 this 28th day of February 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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