IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2292

TROY L. BLOCKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA
Case No. 2D06-693

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

This case is before the Court on discretionary review of three questions certified by the Second District Court of Appeal as a matter of great public importance. The certified questions arise from Petitioner Troy L. Blocker's postconviction motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). Blocker's motion demonstrates a discrepancy on the face of the court record between the oral pronouncement of his sentence, reflected in a transcript of those proceedings, and the written order of his sentence. Florida law is clear that where there is a discrepancy between an oral pronouncement and a written sentence, the oral pronouncement must control. Contrary to this law, both the trial court and the Second District effectively ignored the transcript, concluding as a matter of law that the transcript was in error, and did so without giving Blocker the opportunity to prove otherwise. As shown below, this was error.

The decision below also erred in holding that Blocker's motion for relief was untimely. Florida law provides that, where a defendant alleges that the court records demonstrate on their face an entitlement to relief, a court may correct an illegal sentence *at any time.* Fla. R. Crim. P. 3.800(a). Just because the State contends that the transcript is in error and needs an evidentiary hearing to prove its contention does not convert Blocker's motion from a Rule 3.800(a) claim cognizable at any time into a Rule 3.850 claim subject to a two-year statute of limitations. The decision below should be reversed.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

On February 7, 1989 Blocker appeared before Judge Crockett Farnell, of the Sixth Judicial Circuit Court in and for Pinellas County, Florida, to plead guilty and be sentenced for one count each of burglary and sexual battery in Case No. 87-14776 (R. 79), for two counts each of burglary and sexual battery in Case No. 87-14777 (R. 84), and for one count burglary, one count sexual battery, and one count dealing in stolen property in Case No. 87-14778 (R. 91). Present at the sentencing hearing were Judge Farnell, Blocker, Blocker's attorney Ronnie G. Crider, Esquire, Assistant State Attorney William Loughery, Esquire, and a court reporter from Robert A. Dempster & Associates Official Court Reporters identified as Van Matthews. (R. 8-9). According to the certified transcript prepared by Van Matthews, the following events transpired:

> MR. CRIDER: In front of the Court is Troy Lawade Blocker. We are here this morning pursuant to a discussion that we had with the Office of the State Attorney – Mr. Ruggle and Mr. Loughery.
>
> Of that, it was Mr. Blocker scheduled for trial this morning. We 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 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.

(R. 10-11) (emphasis added). After hearing a factual basis for the charges and the guilty plea, the Court stated the following:

THE COURT: The Court will accept the plea. I will adjudicate the Defendant, sentence him to *nine years* Department of Corrections. A judgment lien will be entered to all amounts of restitution, court costs, and whatever sum may be imposed, and counsel fees.

(R. 15) (emphasis added).

The trial court's oral sentence of nine years is inconsistent with its written sentence imposed on Blocker. Blocker's written Judgment and Sentencing Orders reflect sentences of 99 years for each count in Case No. 87-14776 (R. 81, 82), fifteen years for the first burglary count (R. 86), 99 years for the second burglary count (R. 87), and thirty years each for the two sexual battery counts (R. 88, 89) in Case No. 87-14777, and 99 years for the burglary count (R. 93), 99 years for the sexual battery count (R. 94), and 15 years for the dealing in stolen property count (R. 95) in Case No. 87-14778.

On October 25, 2005, Blocker filed a *Petition for Writ of Habeus Corpus and/or Motion to Correct Illegal Sentence* in the Sixth Judicial Circuit Court in and for Pinellas County, Florida. (R. 3). In his motion, Blocker asserts his entitlement to relief under Rule 3.800(a), which provides, in relevant part, that:

> A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing score sheet, 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.

Fla. R. Crim. P. 3.800(a). Blocker raises a single issue in his motion for relief: the trial court's written sentence and orders do not comport with the oral pronouncement of his sentence. (R. 4). Blocker's motion relies on Florida law, discussed in more detail below, holding that if there is a discrepancy between the oral pronouncement and the written sentence, the oral pronouncement controls. (R. 4-5).

On November 30, 2005, the Sixth Judicial Circuit issued an *Order to Show Cause* to the State to respond to Blocker's motion. (R. 17). The State filed its *Response to Order to Show Cause* on January 13, 2006 and therein alleged that the court reporter "obviously mis-transcribed 'ninety-nine' to just 'nine.'" (R. 22). The State made no attempt to support its assumption that the hearing was "mis-transcribed" with any documentary or testimonial evidence. The State produced no tape, transcription paper, or witness to refute the accuracy of the transcript.

Instead, the State merely relied on evidence that would tend to show that a nine year sentence would be mistaken.

Blocker filed a *Reply* to the State's January 13, 2006 *Response* on January 19, 2006 arguing that, under Florida law, the oral pronouncement of a sentence controls, even when the oral pronouncement may have been mistaken. (R. 65-66). On January 26, 2006, the court issued an *Order Denying Defendant's Motion to Correct Illegal Sentence*. (R. 75). In its Order of denial, the court found "that the sentencing transcript in this case clearly contains a scrivener's error and that this court pronounced a 99-year term as indicated in the written judgments and sentences." (R. 76). The court held it would be improper to conduct an evidentiary hearing under Rule 3.800(a) and therefore assumed that the transcript was mis-transcribed without taking any evidence as to what was actually said at Blocker's sentencing hearing. (R. 76).

On February 8, 2006, Blocker timely filed his *Notice of Appeal and Initial Brief on Appeal.* (R. 127). On June 1, 2006, the Second District issued an Order directing the State to respond to the allegations raised in Blocker's *Initial Brief on Appeal.* (R. 139). In its Order, the Second District requested the State to:

> [A]ddress whether [Blocker's] claim is cognizable under rule 3.800(a). Compare Regino v. State, 921 So. 2d 845 (Fla. 2d DCA 2006); and Dawson/Knapp v. State, 698 So. 2d 266 (Fla. 2d DCA 1997); and Fitzpatrick v. State, 863 So. 2d 462 (Fla. 1st DCA 2004); and

> Berthiaume v. State, 864 So. 2d 1257; with Renaud v. State, 31 Fla. L. Weekly S194 (Fla. March 23, 2006). The State should also address what effect Ashley v. State, 850 So. 2d 1265 (Fla. 2003), and McCray v. State, 838 So. 2d 1213 (Fla. 3d DCA 2003), have on Blocker's claim if we find it cognizable under rule 3.800(a).

The State filed its *Response to Appellate Court Order* on June 21, 2006. (R. 142). On June 29, 2006, Blocker filed his *Reply to Appellee's Response*. (R. 161).

Judge Alternbernd wrote the Second District's opinion, filed on November 16, 2007. (R. 167). *Blocker v. State*, 968 So.2d 686 (Fla. 2d DCA 2007). The Second District agreed that, in cases where the oral sentencing pronouncement conflicts with the written pronouncement, the oral sentence controls. The court, however, affirmed the denial of Blocker's *Motion to Correct Illegal Sentence*, concluding that the hearing was erroneously transcribed, and, thus, the written sentence controlled. The court also ruled that Blocker was not entitled to an evidentiary hearing. According to the court, if an evidentiary hearing is necessary to disprove Blocker's allegation that there is a disparity on the face of the record, then Blocker's motion must be treated as a postconviction motion under Rule 3.850 and subject to the two-year limitation contained in the rule. (R. 174, 180).

In so ruling, the court conceded that the ability of future defendants to litigate future similar motions is, in a sense, entirely dependent on the good faith of

the state attorney. According to the court, if the assistant state attorney on the case suggests that the transcript is in error, then the defendant's motion is automatically converted to a Rule 3.850 motion and subject to dismissal as untimely. The court dismissed this concern by suggesting that future assistant state attorneys will act in good faith in response to such motions. (R. 180). Judge Davis added a concurring opinion in which he warned future movants that they should not necessarily assume that all challenges based on written/oral discrepancies are cognizable under Rule 3.800(a). 968 So. 2d at 694.

B. Questions Certified by the Second District

In affirming the denial of Blocker's *Motion to Correct Illegal Sentence*, the Second District certified the following three questions 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 judge's oral pronouncement, or

(3) May the trial court deny the motion as an untimely request for relief pursuant to Rule 3.850?

(R. 170). Blocker now submits his initial briefing on this question of great public importance suggesting that the first two questions must be answered in the affirmative and the third in the negative.

SUMMARY OF THE ARGUMENT

Florida law is clear, as the lower courts observed, that the oral pronouncement of a sentence controls over any inconsistent written sentence. The transcript is the best evidence in the record of the court's oral pronouncement of Blocker's sentence. Indeed, the transcript is entitled to a presumption of accuracy. As the record demonstrates on its face that the trial court's written sentencing orders are inconsistent with the transcript's recordation of the court's oral pronouncements, Blocker is entitled to relief under Rule 3.800(a).

This case also raises important issues of due process. The courts below rejected Blocker's claim based on the assumption that the transcript was wrong, an assumption not based on a single piece of evidence. This is not, and cannot be the law of Florida. Even if the trial court's oral pronouncement of sentence does not prevail, Blocker is entitled to an evidentiary hearing demonstrating whether or not the transcript is in fact in error.

Blocker's claim for relief is timely under Rule 3.800(a). The State cannot convert Blocker's timely Rule 3.800(a) motion into an untimely Rule 3.850 motion merely by alleging that the transcript of his sentencing hearing is erroneous. In fact, Florida courts have considered evidence and disputed facts when presented in the form of a Rule 3.800(a) motion for relief.

For these reasons and those set forth more fully below, the decision of the Second District should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

This Court has discretionary jurisdiction to review questions certified by a district court to be of great public importance. Fla. Const. art. V, § 3(b)(4). In reviewing the Second District's certified questions in this case, this Court must view the facts in the light most favorable to Blocker and must consider all facts and reasonable inferences to his advantage. *Hearndon v. Graham*, 767 So. 2d 1179, 1182 (Fla. 2000). Indeed, where a court denies without an evidentiary hearing a motion for postconviction relief brought pursuant to Rule 3.800(a), "[o]n 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." Fla. R. App. P. 9.141(b)(2)(D).

II. OVERVIEW OF THE LAW ON SENTENCING DISPARITIES

Judge Altenbernd's opinion recognizes that, in Florida, where there is a discrepancy between the oral pronouncement of a sentence and the written sentence, the oral pronouncement controls. *Blocker v. State*, 968 So. 2d 686, 691 (Fla. 2d DCA 2007); R. 174. Other Florida courts have also recognized and affirmed this long-standing rule. See, e.g., *Ashley v. State*, 850 So. 2d 1265, 1267-68 (Fla. 2003) ("When conflict arises between the written sentence and the oral pronouncement, the oral pronouncement prevails."); *Comtois v. State*, 891 So. 2d 1130, 1131 (Fla. 5th DCA 2005) (same); *Moreland v. State*, 853 So. 2d 574, 575

(Fla. 4th DCA 2003) (same); *Ross v. State*, 831 So. 2d 817, 818 (Fla. 4th DCA 2002) (same); *Raford v. State,* 792 So. 2d 476, 480 (Fla. 4th DCA 2001) (holding that an oral pronouncement controls over a scrivener's error); *Tory v. State*, 686 So. 2d 689, 691 (Fla. 4th DCA 1996) (finding that an oral pronouncement prevails over a written sentence despite argument that oral pronouncement was a "misstatement"); *Perez v. State*, 498 So. 2d 1005, 1005-06 (Fla. 2d DCA 1986) (holding that written judgment and sentence must not vary from oral pronouncement).[1] *But see Harmon v. State,* 599 So. 2d 754, 756-57 (Fla. 4th DCA 1992) (upholding written sentence reflecting credit for 278 days time served over oral pronouncement of credit for 378 days time served where defendant was actually in custody for only 278 days).

Courts in Florida have long applied this rule when presented with such discrepancies – even when it is alleged that the oral pronouncement was a

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[1] *See also Gillen v. State*, 696 So. 2d 952, 952 (Fla. 4th DCA 1997) (remanding to conform written sentence which did not reflect credit for time served to oral sentence where intent was to give credit for time served); *Farmer v. State*, 670 So. 2d 1143, 1144 (Fla. 1st DCA 1996) (remanding for correction of written sentence imposing multiple thirty year sentences for several burglary charges where oral sentence imposed thirty years as habitual offender for first charge and only five years for other offenses); *Drumwright v. State*, 572 So. 2d 1029, 1030-31 (Fla. 5th DCA 1991) (accepting oral sentence of thirty years as a habitual offender over written sentence of thirty months without habitual offender status where written sentence was result of clerical error); *Hall v. State*, 579 So. 2d 913, 914 (Fla. 5th DCA 1990) (recognizing that oral pronouncements prevail over clerical errors in written sentences); *Perez v. State*, 498 So. 2d 1005, 1006 (Fla. 2d DCA 1986) (remanding to correct written sentence which did not reflect specific statutory sections under which defendant was orally sentenced).

misstatement. For example, in *Ashley v. State*, 850 So. 2d 1265, 1268 (Fla. 2003), this Court specifically noted that the oral pronouncement would control, even if it were the result of a "simple mistake." Likewise, the Fifth District Court of Appeal has considered the discrepancy between a sentence orally imposed on a defendant of "thirteen years, nine months in prison, less time served, followed by probation" and a written sentence of "fourteen years, nine months in prison, less time served, followed by probation." *Comtois*, 891 So. 2d at 1131. Following sentencing, the trial court refused the defendant Comtois's request to conform his written sentence to that orally pronounced, and indicated that the thirteen year oral sentence had been a misstatement. *Id.* The district court reversed, holding that even though Rule 3.800(a) authorizes a court to correct an illegal sentence, it "does not permit the court to increase a legal and unambiguous sentence after the pronouncement becomes final, even if the orally pronounced sentence was based on mistake." *Id.* Thus, the oral pronouncement of thirteen years prevailed and the written sentence had to be corrected to conform to that oral announcement. *Id.* at 1132.

Similarly, the Fourth District Court of Appeal considered such a discrepancy and held that the oral pronouncement of a sentence must prevail. *Ross v. State*, 831 So. 2d 817 (Fla. 4th DCA 2002). In *Ross*, the trial court orally pronounced a sentence of thirty years in prison with credit for time served and that "[t]he assessment of costs and public defender fees imposed . . . are hereby ratified and incorporated herein by reference as part of this Court's sentence." *Id.* at 817-18.

This oral sentence was then set forth in a written order which assessed costs totaling $305. *Id.* at 818. On appeal of the imposition of costs, the district court agreed with the defendant and held that the oral ratification and incorporation of court costs prevailed over the inconsistent written imposition of costs. *Id.*; *see also Tory v. State*, 686 So. 2d 689, 691 (Fla. 4th DCA 1996) (finding that an oral pronouncement prevails over a written sentence despite argument that oral pronouncement was a "misstatement").

Other state courts similarly recognize that the oral pronouncement of a sentence controls over any inconsistent written sentence. *See, e.g.*, *State v. Allen*, 172 P.3d 1150, 1153 (Idaho Ct. App. 2007) (holding that, under Idaho law, the only legal sentence is that consisting of the words pronounced in open court by the judge, not the words appearing in the written order of commitment); *State v. Baldwin*, 150 P.3d 325, 327 (Kan. Ct. App. 2007) (recognizing state rule that where there is a variance between the oral announcement of sentence and the sentence set forth in the written judgment, the oral sentence prevails); *State v. Johnson*, 220 S.W.3d 377, 384 (Mo. Ct. App. 2007) ("As a general rule, if there is a material discrepancy between the oral pronouncement of the trial court's judgment and sentence and the written entry of judgment, the oral pronouncement controls."); *State v. Oglesby*, 715 N.W.2d 727, 724 (Wis. Ct. App. 2006) ("When an unambiguous oral pronouncement at sentencing conflicts with an equally unambiguous pronouncement in the judgment of conviction, the oral

pronouncement controls.") This appears to be the majority rule in the United States.

Considered together, this precedent is legion. The oral pronouncement of Blocker's sentence must prevail over the inconsistent written sentencing order.

III. BLOCKER IS ENTITLED TO BE RESENTENCED – THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED "YES."

Application of this unassailable rule to the facts of this case is simple. Under Rule 3.800(a), a court may at any time correct an illegal sentence when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief. Fla. R. Crim. P. 3.800(a). Here, Blocker has alleged that the court records demonstrate on their face that he is entitled to relief: there is a clear discrepancy between the transcript and the written sentencing order. And, this discrepancy, when considered in light of Florida law that the oral pronouncement of a sentence controls, entitles Blocker to relief. (R. 4-5); *see Easterling v. State*, 596 So. 2d 103, 103 (Fla. 2d DCA 1992) (reversing sentence and remanding where written sentence gave credit for 197 days served, where defendant alleged that oral pronouncement gave credit for two and one-half years served, and where the district court could not determine from the written sentence whether the defendant received the proper amount of credit for time served).

Blocker's claim is apparent from the face of the records. He simply relies on the accuracy of the official certified transcript of his sentencing proceeding,

reliance that must be credited by this Court. As long ago as 1908, this Court has recognized that a transcript must be presumed correct. *See Cross v. Robinson Point Lumber Co.*, 46 So. 6, 7 (Fla. 1908) (presuming a transcript correct and finding that where a typewritten transcript of the record contained the word "Seal" following the names of the grantors to a deed, and where the testimonial clause preceding the signatures stated that the signatories gave their seal to the instrument, the deed was sealed). *Cross* remains good law. No reported decision in Florida has concluded that a certified transcript is not entitled to a presumption of correctness.

Similarly, other states have recognized that a transcript is presumed to reflect an accurate record. *See, e.g.*, *White v. St. Louis Teachers Union*, 217 S.W.3d 382, 392 (Mo. Ct. App. 2007) (finding that a duly approved transcript is presumed to be correct). Federal courts are also bound to recognize a certified transcript as prima facie correct. 28 U.S.C. § 753(b) ("The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had."); *U.S. v. Smith*, 433 F. 2d 149, 151 (5th Cir. 1970) (applying 28 U.S.C. § 753(b)).

Thus, the State's cavalier assumption that the transcript is inaccurate is contrary to the long settled law of Florida and federal law and the law of other states. The State made no attempt to present evidence that the transcript was

inaccurate, evidence that would have been readily available. For example, the State did not seek out the tape of the hearing, the testimony of the court reporter, or the court reporter's notes from the hearing. Neither did the State offer evidence from any of the many witnesses to the hearing, all of which, as Judge Altenbernd pointed out below, are still alive and able to testify. Indeed, the State did not even seek to justify its rejection of Florida law that the oral pronouncement of a sentence prevails by putting forth evidence that the written sentence was correct. Simply put, the State offered no evidence whatsoever in support of its position that Blocker's argument is wrong.

It is too late now for the State to contest the accuracy of the transcript. The transcript is presumed to be a correct reflection of the oral pronouncement and the oral pronouncement prevails. In short, the Second District's certified question, "Must the trial court rule in favor of the Defendant as a matter of law because the transcript controls the issue," should be answered in the affirmative.

IV. BLOCKER SHOULD BE ENTITLED TO AN EVIDENTIARY HEARING – THE SECOND CERTIFIED QUESTION SHOULD BE ANSWERED "YES."

At the very least, Blocker's motion cannot be denied without an evidentiary hearing. The trial court and the Second District both rejected Blocker's argument that the transcript of the sentencing hearing prevails over the written sentence. To do so, each of the courts assumed that the transcript was in error without considering any of the direct evidence that may have been available, such as the

tape of the hearing or the testimony of the participants to the hearing. Thus, in ruling against Blocker without an evidentiary hearing, the courts effectively created an irrefutable presumption that the transcript is in error.

As a threshold matter, this irrefutable presumption created by the lower courts is in direct conflict with the presumption of accuracy afforded to transcripts by Florida and other state and federal courts. *See Cross*, 46 So. at 7; *see also* 28 U.S.C. § 753(b); *White*, 217 S.W.3d at 392. Thus, the failure to grant an evidentiary hearing was incorrect as a matter of Florida law.

The presumption created by the lower courts also is contrary to Florida Rule of Appellate Procedure 9.141(b)(2)(D). According to the rule, where a court denies without an evidentiary hearing a motion for postconviction relief brought pursuant to a Rule 3.800(a), "[o]n 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." Fla. R. App. P. 9.141(b)(2)(D). Indeed, in this case the record shows conclusively that Blocker *is* entitled to relief – unless the State is able to prove the official record is incorrect. This determination cannot be made without an evidentiary hearing.

As Rule 9.141(b)(2)(D) recognizes, where the right to an evidentiary hearing is erroneously denied, the effect of the error in preventing the presentation of evidence is never harmless for the obvious reason that a reviewing court cannot

know what the evidence would be. *Holland v. State*, 503 So. 2d 1250, 1252 (Fla. 1987). Instead of a summary rejection, Blocker must at least be given an evidentiary hearing to entertain questions of fact which cannot be conclusively resolved by the record. *Id*. at 1252-53. These questions include what evidence exists to support or refute the accuracy of the court's oral pronouncement of Blocker's sentence as reflected in the transcript of those proceedings. *See id.*

To hold otherwise is to deny Blocker due process. *Id*. at 1253 ("When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process."); *see also Townsend v. State*, 927 So. 2d 1064, 1065 (Fla. 4th DCA 2006) ("Under rule 3.170(l), Florida Rules of Criminal Procedure, the trial court is not required to hold an evidentiary hearing on a motion to withdraw plea. However, when the record fails to conclusively refute the defendant's allegation of entitlement to relief, due process requires an evidentiary hearing.")

The conclusions of the courts below preclude Blocker the opportunity to put forth evidence that might confirm his argument that the transcript is accurate. By way of example, Judge Farnell, Ronnie Crider, Blocker's lawyer at the time, and Assistant State Attorney William Loughery are all still alive according to current records of The Florida Bar, and presumably can be called upon to recall the events of Blocker's sentencing hearing. What if one of these witnesses recalls that the sentence orally imposed on Blocker was nine years? No matter, say the lower

courts. What if the court reporter's notes show that Judge Farnell orally imposed a sentence of nine years? Again, no matter. What if a tape of the hearing reveals that Judge Farnell said "nine years" and not "ninety-nine years?" Blocker is again without recourse. This irrefutable and unlawful presumption eviscerates any chance Blocker has to contradict the State's belief and the lower courts' acceptance that the transcript is mistaken.

The courts below sought to justify their decision in this case by pointing out that Blocker scored life in his sentencing report. But this is irrelevant. If the oral pronouncement was "nine years," nine years is the only legal sentence regardless what the score sheet shows. Thus, the only question in this case is whether the transcript is accurate. We presume that it is, and the State has made no effort to prove that there was a mis-transcription. At the very least, Blocker is entitled to an evidentiary hearing on that score.

But of course, the decision in this case does not affect only Blocker. What about the next defendant, or the one after that? If the State merely has to suggest that the transcript is erroneous, is the defendant left without any remedy no matter what the evidence may prove? That cannot and should not be the law of Florida.

The decision below recognizes this problem and appears to be troubled by it. As the Second District effectively acknowledged, the logical end of the court's approach will result in the denial of an evidentiary hearing merely on the suggestion of the prosecutor that the transcript is wrong. Indeed, Judge Davis felt

moved to write a concurring opinion in which he recognized that the movant is at a "serious disadvantage." 968 So. 2d at 694. According to Judge Davis, "upon the mere suggestion of the inaccuracy in the transcript by the State, his motion must be denied – even without the State's suggestion being tested." *Id*.

This is a most remarkable and revealing statement. The most fundamental tenet of our criminal justice system is that the State must prove its allegations. Assumptions are not enough. The State must prove its assumptions.

Indeed, in responding to Judge Davis's concern, Judge Altenbernd recognized that, "at least in theory, a state attorney could contest a claim that a written sentence did not comport with the oral pronouncement for the purpose of enforcing an erroneous written sentence." *Id*. at 693. Judge Altenbernd first took comfort in the fact that, in most cases, the State will produce documentation to support its bald assertion. *Id*. But here the State has not produced any documentation other than a bald assertion. Still, Blocker was denied the right to test this bald assertion.

What if the prosecutor is wrong? Judge Altenbernd also took comfort by noting that State attorneys would not abuse their powers to deny relief to a worthy defendant. Without in any way impugning the integrity of the prosecutors of this State, they, like any other lawyer, are sometimes mistaken in their beliefs. The prosecutor may, in good faith, believe that the transcript is in error, but the

prosecutor may be wrong. Indeed, prosecutors (and defense counsel) are frequently in good faith, but mistaken. That is why we have appellate courts.

Even worse is the sad fact that the legal profession, like any other profession, is not free from those individuals who, through misguided motives, will act in bad faith in a particular case to reach a particular result. One need look no further than the Duke Lacrosse team case for verification of that unfortunate fact.

Thus, it bears stating the obvious that both the State and the defense are heard from before a decision on guilt is made. So too is a trial not avoided merely because the prosecutor or the court is confident about the State's evidence against an accused. *See Kelley v. Rice*, 800 So. 2d 247, 251 (Fla. 2d DCA 2001) ("Due process requires that before a person may be convicted and sentenced to jail, she must be afforded reasonable notice of the charges against her and an opportunity to be heard which includes at a bare minimum the right to examine witnesses against her, the right to offer testimony, and the right to counsel."); *Harrell v. State*, 405 So. 2d 480, 483 (Fla. 3d DCA 1981) (recognizing that the right of a criminal defendant to due process includes the right to a fair opportunity to defend oneself against the state's accusations). To act otherwise would be to turn the adversarial legal system on its head! If denied the presumption of the transcript's correctness, and if denied the rule that oral pronouncements of sentences control, Blocker seeks nothing more than to be given the opportunity to ferret out which sentence the court actually intended to impose.

Accordingly, the Second District's certified question, "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," should be answered in the affirmative.

V. BLOCKER'S RULE 3.800(a) MOTION IS THE APPROPRIATE AVENUE OF RELIEF AND IS NOT UNTIMELY – THE THIRD CERTIFIED QUESTION SHOULD BE ANSWERED "NO."

Blocker filed his *Motion to Correct Illegal Sentence* pursuant to Rule 3.800(a) which provides that a "court may *at any time* correct an illegal sentence imposed by it . . . when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief." Fla. R. Crim. P. 3.800(a) (emphasis added). It is undisputed that a discrepancy exists on the face of the record before this Court. *Compare* R. 10-11 and 15 *with* R. 81, 82, 87, 93, and 94. The transcript of Blocker's sentencing hearing indicates that Judge Farnell sentenced Blocker to nine years; the written sentencing order indicates that Judge Farnell sentenced Blocker to ninety-nine years. This discrepancy is apparent on the face of the record.

Moreover, this Court has made clear that this sort of discrepancy on the face of the records is the sort of error cognizable by Rule 3.800(a). *Williams v. State*, 957 So. 2d 600 (Fla. 2007). A written sentence that conflicts "with the oral pronouncement of sentence imposed in open court is an illegal sentence." *Id*. at

603. Thus, this error, which appears on the face of the records, can be brought at any time.

The district court, however, held that Blocker's motion was untimely because an evidentiary hearing would be needed to determine the accuracy of the transcript. According to the court, if an evidentiary hearing is needed, the motion is converted from a Rule 3.800(a) motion to a Rule 3.850 motion and subject to the two-year limitation of Rule 3.850. But this argument ignores the language of Rule 3.800(a), overlooks the nature of Blocker's claims, and misinterprets this Court's decision in *Williams*.

Here, despite the presumption of accuracy afforded to written transcripts and despite the rule that oral pronouncements control, the State challenges the correctness of the record. If this Court is inclined to permit the State to maintain that challenge, then it is the State who wants and needs the evidentiary hearing and not Blocker. In other words, the State has not proven that there is no conflict on the face of the record. Instead, the State asks the Court to *ignore* the conflict on the face of the record because the State says the transcript is wrong. As noted in Section III. above, however, the conflict in the record cannot be ignored and the law already resolves the conflict in Blocker's favor. If the State is to be allowed to go behind and challenge the record, that is the State's problem. The State cannot convert Blocker's Rule 3.800(a) motion into a Rule 3.850 motion merely by

suggesting that the transcript is inaccurate and that an evidentiary hearing would be necessary to test the State's assumption.

To begin with, the State's argument is contrary to the language of the rule. Rule 3.800(a) says nothing about whether an evidentiary hearing may be conducted if necessary. All the rule requires is that the movant allege that the court records demonstrate on their face an entitlement to relief, which is precisely what Blocker shows as alleged and demonstrated here. Indeed, Blocker has brought to the courts precisely what this Court has required in such cases, a copy of a transcript showing the oral pronouncement below. *Williams*, 957 So. 2d at 604.

Nor does this Court's decision in *Williams* foreclose an evidentiary hearing in cases brought under Rule 3.800(a). Although the Court notes that in most cases, one should be able to determine the matter on the face of the record, the Court does not suggest that this will be always be the case. Nor does *Williams* state that an evidentiary hearing may not be conducted. Instead, this Court merely concluded that "rule 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." 957 So. 2d at 603-04. The Court was not presented with a case like this one where the State, not the defendant, needs an evidentiary hearing; its reasoning does not go so far as to always preclude the need for an evidentiary hearing under a Rule 3.800(a) motion. Indeed, even

though "trial courts should be able to determine by an examination of the record of the sentencing proceeding, but without the need for an evidentiary hearing, whether the written sentence conforms with the oral pronouncement," a trial court may order the State to file a response to the Rule 3.800(a) motion "to explain an apparent discrepancy before the matter is adjudicated." 957 So. 2d at 604-05, 605 n.2.

Where the State's response only offers conjecture and supposition to explain the discrepancy, the trial court's ability to discern the accuracy of the oral pronouncement should not be limited to such an order, and may appropriately be extended in this case to include the consideration of evidence and testimony as to the sentence intended to be imposed. *See also Bover v. State*, 797 So. 2d 1246, 1251 (Fla. 2001) (questioning whether an evidentiary hearing may be necessary in a Rule 3.800(a) challenge to the viability of predicate offenses used to habitualize an offender for sentencing).

True, where there is no ambiguity in the trial court's oral pronouncement, the sentencing order may be corrected without need of further evidence to reflect that oral pronouncement. *Moreland*, 853 So. 2d at 575 (written sentencing order reflecting 536 days credit for time served corrected to conform to oral pronouncement of 556 days credit for time served). Where a discrepancy exists between the oral pronouncement of a sentence and its written order, and where the

state does not concede that the written sentence is erroneous, however, it is appropriate to remand to the trial court for clarification.

As the decision below acknowledges, there is precedent supporting evidentiary hearings under Rule 3.800(a) when necessary to resolve a fact dispute. *See Blocker,* 968 So. 2d at 692 (recognizing that cases have been remanded to determine whether a transcript was the accurate pronouncement of the trial court). For example, the Second District Court of Appeal considered a discrepancy between the transcript of a sentencing hearing that sentenced a defendant to "four years in prison as a habitual offender" and the written sentencing orders that pronounced a sentence of "40 years in prison as a habitual offender." *Enchautegui, v. State,* 749 So. 2d 550, 550 (Fla. 2d DCA 2000). In support of the longer sentence, the State argued that the trial court did in fact announce a sentence of 40 years, and that the discrepancy was only a result of a court reporter's error. *Id.* Because the State did not concede that the written sentence was erroneous, "a conflict between the oral pronouncement and the written order require[d] a factual resolution by the trial court" and the case was remanded for an order clarifying the sentences imposed. *Id.*; *see Ellis v. State*, 816 So. 2d 759, 762 (Fla. 4th DCA 2002) (remanding for clarification of written sentence where sentence imposed "$50 SNI fee" and neither the State nor the defendant knew what the fee was); *Mosely v. State*, 659 So. 2d 1342, 1344 (Fla. 5th DCA 1995) (remanding to determine actual sentence intended where oral sentence was inconsistent with written sentence and

State did not concede that any error was clerical); *Lester v. State*, 563 So. 2d 178, 179 (Fla. 5th DCA 1990) ("Absent concession by the state, a conflict between the written order and the oral pronouncement requires a factual resolution by the trial court.").

Other states too recognize the need to sometimes receive evidence in cases challenging a sentence. *See, e.g.*, *Fowler v. State*, 766 P.2d 588, 590 n.1 (Alaska Ct. App. 1988) (concluding that the trial court is vested with discretion to order an evidentiary hearing when ruling upon a defendant's motion to reduce a sentence); *Niece v. State*, 456 N.E.2d 1081, 1086 (Ind. Ct. App. 1983) (reciting that evidentiary hearing was held pursuant to motion to correct an erroneous sentence under Indiana Code section 35-38-1-15).

Federal courts applying the comparable Federal Rules of Criminal Procedure have also concluded as much. In a case remarkably on point, the Ninth Circuit considered a motion to correct a clerical error in the record brought pursuant to Rule 36 of the Federal Rules of Criminal Procedure. *U.S. v. Bergmann*, 836 F.2d 1220 (9th Cir. 1988). In *Bergmann*, the trial court's written sentencing order reflected a term of five years incarceration and a term of one year incarceration, each to run consecutively. *Id.* at 1220. The transcript of the sentencing proceedings reflected that the five-year and one-year terms would run concurrently, however. *Id.* at 1220-21. Bergmann sought to correct this clerical error and have the written sentence conformed to the oral pronouncement. *Id.* at

1221. The government opposed the relief requested, arguing that any clerical error lay in the certified transcript of the proceedings rather than in the signed sentencing order, and filed an affidavit of the judge, the prosecuting attorney, and the court reporter in support of its argument. *Id.* The trial court found for the government, reasoning that the affidavits supported the conclusion that the transcript contained an error, and not the written sentence. *Id.*

The Ninth Circuit reversed. *Id.* at 1223. Recognizing, first, that an oral pronouncement controls over a written sentence and, second, that a certified transcript is statutorily deemed to be prima facie correct, the court found that Bergmann was entitled to rely on that presumption and that the government bore the burden of overcoming the presumption in order to defeat Bergmann's motion. *Id.* at 1222. As the trial court had impermissibly ignored Bergmann's entitlement to rely on the correctness of the oral pronouncement reflected in the transcript, the court remanded for an evidentiary hearing to consider the government's affidavits submitted to defeat Bergmann's motion. *Id.* at 1223. *See also U.S. v. Munoz-Dela Rosa*, 495 F.2d 253, 256 (9th Cir. 1974) (holding that oral pronouncement of a sentence controls over the written sentence, even where the sentencing judge admits to having misspoke).

As these cases suggest, where an evidentiary hearing is needed to determine the legality of Blocker's sentence, that hearing should be granted. Here, Blocker presents two documents, one presumed to be accurate, which reflect starkly

different sentences. On the one hand, the transcript, which reflects the oral pronouncement of sentence, imposes a term of nine years. On the other hand, the written sentencing order imposes of a term of ninety-nine years. As discussed extensively above, Florida law holds that the oral pronouncement of a sentence controls, and that this discrepancy is cognizable under Rule 3.800(a). Blocker has alleged and demonstrated that the record on its face demonstrates his entitlement to relief, and his claim is appropriately brought under Rule 3.800(a).

Indeed, on appeal of the denial of his Rule 3.800(a) motion, unless the record shows conclusively that Blocker is entitled to no relief, this Court must reverse and direct the district court to remand for an evidentiary hearing or other appropriate relief. Fla. R. App. P. 9.141(b)(2)(D); *Rivera v. State*, 949 So. 2d 1090, 1091 (Fla. 3d DCA 2007) (remanding for further proceedings the denial of a defendant's Rule 3.800(a) motion alleging that the trial court calculated but failed to apply a guideline sentence where the record did not conclusively refute the defendant's allegations); *Gavino v. State*, 932 So. 2d 560, 561 (Fla. 3d DCA 2006) (ordering remand, where defendant challenged status as habitual offender pursuant to Rule 3.800(a) and where record failed to conclusively demonstrate entitlement to no relief, for further proceedings); *Dobarganes v. State*, 930 So. 2d 765, 765 (Fla. 3d DCA 2006) (same); *Lopez v. State*, 917 So. 2d 256, 256 (Fla. 3d DCA 2005) (remanding for a hearing where the record before the appellate court failed

to conclusively demonstrate that the defendant was not entitled to relief under Rule 3.800(a)).

Accordingly, the third question certified by the Second District, "may the trial court deny the motion as an untimely request for relief pursuant to Rule 3.850," should be answered in the negative.

CONCLUSION

For all of the foregoing reasons, the Second District's order affirming the trial court's denial of Blocker's *Motion to Correct Illegal Sentence* should be reversed. This case should be remanded and Blocker's written sentence ordered to conform to the trial court's oral pronouncement of sentence. Alternatively, the trial court should be ordered to conduct an evidentiary hearing to resolve the discrepancy between the transcript of the sentencing proceedings and the written judgment and sentencing orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Initial Brief* was furnished on this **8th** day of **February, 2008** by e-mail to the Clerk of the Court, and by U.S. Mail to:

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, Troy L. Blocker, certifies that this *Initial Brief* is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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