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

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Blocker's Rule 3.800(a) motion is based squarely on the face of the record. The transcript reflects that the trial court sentenced Blocker to nine years. As the State concedes, not only is the transcript presumed to be correct, the oral pronouncement controls, regardless whether the trial judge's pronouncement was a mistake. These concessions are dispositive and Blocker's sentence should be conformed to the oral pronouncement.

The state's response attempts to circumvent these undisputed legal principles by setting up a classic "Catch-22." Arguing that the Court should assume that the transcript is in error, the State proceeds to offer unsworn and unrebutted testimony to support its assumption. Then, having offered this evidence, the State takes the position that its unsworn and unrebutted testimony is conclusive. If Blocker does nothing, the State wins – apparently the Court must simply accept the State's proffer as dispositive and ignore the error appearing on the face of the record. But if Blocker seeks to contest the proffer, then Blocker also loses because the State, by offering evidence, has turned Blocker's Rule 3.800(a) motion into a time-barred Rule 3.850 motion and it is too late for Blocker to respond with evidence of his own. Talk about having your cake and eating it too!

As we demonstrate in this reply, the State's position, in addition to its obvious unfairness, is wrong as a matter of law. First, the State has offered no

competent evidence to overcome the presumption that the transcript is accurate. As shown below, the State has confused evidence of what the trial judge should have said with what the trial judge actually said. But what was actually said controls, and the only evidence on that score is the transcript. Blocker is entitled to the relief he seeks. Second, assuming the State is to be given a further opportunity to demonstrate that the transcript is wrong, the fact that the State needs an evidentiary hearing to prove the record is incorrect does not convert Blocker's motion to a time-barred Rule 3.850 motion. Blocker's motion is squarely within the language of Rule 3.800(a) and nothing in the law prohibits the Court from ordering an evidentiary hearing under that rule. Thus, Blocker's motion is timely, and, at the very least, he is entitled to an evidentiary hearing.

I. WHAT THE TRIAL JUDGE SHOULD HAVE SAID IS IRRELEVANT, THE ISSUE IS WHAT THE JUDGE DID SAY.

The discrepancy on the face of the sentencing record is clear. The written record shows ninety-nine years but the transcript reflects nine years. The State concedes that, if the transcript is an accurate reflection of the trial judge's oral pronouncement, the oral pronouncement controls, regardless of whether the trial court was mistaken. *See* Answer Brief (AB) at 21. Blocker is entitled to the relief he seeks because the State has offered no evidence to rebut the presumption that the transcript is an accurate reflection of the oral pronouncement. Indeed, Blocker

draws a plain line between what is relevant and what is irrelevant in his initial brief. The State is on the wrong side of this line.

The State focuses on evidence that a nine-year sentence would have been mistaken. It argues that the plea form which reflects a disposition of 99 years, the guidelines scoresheet which reflects a recommended sentence of life, and the judgment and sentencing documents which reflect 99 year concurrent terms suggest that the parties anticipated sentences totaling 99 years and that the seriousness and significance of the charges merited the 99 year sentence. *See* AB at 22-24.

We will concede for the purposes of argument that there is evidence that the sentence should have been 99 years, not nine. But that is not the issue. Regardless what the sentence should have been, the question is what the trial judge actually said. On this point the State offers no evidence at all. Where is testimony from the trail judge or the lawyers who were there? Where is the sworn testimony of other eyewitnesses to the sentencing? Where is the court reporter's tape recording of the sentencing? Where is the stenographer's tape? Where are the court reporter's notes? The State offers none of this evidence to rebut the presumption that the transcript is an accurate reflection of the trial court's oral pronouncement.

The best the State can do is offer the unsworn evidence of the State Attorney, who states that his recollection is that the court sentenced the defendant

to ninety-nine years and then builds upon this unsworn evidence with unsworn and untested hearsay from the defense attorney. But this unsworn evidence is telling for what it does not say. Neither the State Attorney nor the defense counsel states that the transcript is an inaccurate reflection of what the trial judge said. Neither states that the judge actually said 99 years, not nine. Once again, the question is not whether there is evidence that the trial judge meant to sentence Blocker to 99 years, the question is what the judge actually said, and the State's unsworn evidence carefully dances around this point.

In short, as the State concedes, the transcript is entitled to a presumption of accuracy, *Cross v. Robinson Point Lumber Co.*, 46 So. 6, 7 (Fla. 1908). *See* AB at 21. Moreover, as the State also concedes, the oral pronouncement controls over the written record, regardless whether it was mistaken. *See* AB at 21. Having offered no evidence of what the trial judge actually said, the State has not overcome the presumption of accuracy and Blocker is entitled to relief. *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.").

II. THE STATE'S NEED FOR AN EVIDENTIARY HEARING DOES NOT RENDER BLOCKER'S MOTION UNTIMELY.

Blocker does not need an evidentiary hearing to show his entitlement to relief. As required by Rule 3.800(a), the court records demonstrate on their face

that his 99-year sentence is illegal. The fact that the State needs an evidentiary hearing to dispute the accuracy of those records does not convert Blocker's valid Rule 3.800(a) motion into a time-barred Rule 3.850 motion.

As demonstrated by Blocker's initial brief, nothing in Rule 3.800(a) forecloses the relief he seeks. He is entitled under the Rule to bring his motion *at any time* so long as his entitlement to relief appears on the face of the record. The State's cases are inapposite. Neither *State v. Callaway*, 658 So. 2d 983 (Fla. 1995), *receded from on other grounds by Dixon v. State*, 730 So. 2d 265 (Fla. 1999), nor *Hopping v. State*, 708 So. 2d 263 (Fla. 1998), supports the State's argument that Blocker's motion is really a time-barred Rule 3.850 motion.

Callaway involved review of the imposition of consecutive habitual felony offender sentences under this Court's decision in *Hale v. State*, 630 So. 2d 521 (Fla. 1993). *Callaway*, 658 So. 2d at 985. *Hale* held that consecutive habitual felony offender sentences could not be imposed for multiple offenses arising out of the same criminal episode. *Hale*, 630 So. 2d at 524. The defendant in *Callaway* argued that his sentence was illegal because the trial judge should have determined that his crimes arose out of one criminal episode. But this argument is not apparent from the face of the records. The determination of whether a *Hale* violation had occurred necessarily requires a consideration of whether the offenses for which a defendant was sentenced arose out of a single criminal episode.

Callaway, 630 So. 2d at 988. As such an inquiry depends on the times, places, and circumstances of the offense, it cannot be resolved from the face of the record. *Id.* The court concluded that because the defendant needed an evidentiary hearing to prove his case, the violation was not apparent on the face of the record and Rule 3.800(a) was not the proper vehicle through which the defendant could test the legality of his sentence. *Id.*

By contrast, *Hopping* demonstrates that a violation appearing on the face of the record is cognizable under Rule 3.800(a). In *Hopping*, the defendant moved to correct a sentence that violated principles of double jeopardy. 708 So. 2d at 264. Hopping was originally sentenced to a term of thirty months' incarceration to be followed by eighteen months' probation. *Id.* Following his release, Hopping's probation was revoked, and the trial court resentenced him to another thirty-six months' incarceration with thirty months credit for time served. *Id.* Hopping believed the new sentence to be sixty-six months, and thus in excess of the sixty-month maximum for the offense of which he was convicted. *Id.* He moved to correct the sentence under Rule 3.800(a). *Id.* The trial court corrected and modified the sentence by vacating the original sentence and imposing in lieu thereof a sentence of sixty months, thereby doubling Hopping's original sentence. *Id.* Hopping again moved for relief under Rule 3.800(a). *Id.* The trial court

denied the motion, and the First District affirmed, reasoning that the sentence's defect was not cognizable under that rule. *Id.* at 264-65.

This Court quashed the decision of the district court and found that the trial court could determine as a matter of law that Hopping's sentence had been unconstitutionally enhanced in violation of the double jeopardy clause. *Id.* at 265. In short, the error, as in this case, was apparent on the face of the record.

As discussed in his initial brief, Blocker does not need an evidentiary hearing to show that the court records demonstrate on their face an entitlement to relief. *See* Initial Brief of Petitioner (IB) at 23-25. As a matter of law, the oral sentence imposed on Blocker controls and the trial court need not examine anything beyond the sentencing record to rule on Petitioner's Rule 3.800(a) motion. *Callaway* is inapposite because Blocker is not asking the trial court to consider the time, place, or circumstances of his sentencing. *See Callway*, 630 So. 2d at 988. Blocker only asks the court to review the record and resolve the discrepancy found therein in accordance with the long settled law of this state, law that the State does not dispute.

Contrary to the State's argument, Florida law does not foreclose relief under Rule 3.800(a) where an evidentiary hearing is required. In fact, Florida Rule of Appellate Procedure 9.141(b)(2)(D) explicitly contemplates holding an evidentiary hearing where a motion for postconviction relief brought pursuant to Rule 3.800(a)

is denied, unless the record shows conclusively that the appellant is entitled to no relief. Fla. R. App. P. 9.141(b)(2). So too has this Court recognized that a Rule 3.800(a) motion may in some circumstances call for a response from the State or for an evidentiary hearing. *See Williams v. State*, 957 So. 2d 600, 604-605 n.2 (Fla. 2007) (instructing that trial courts may order the State to respond to a Rule 3.800(a) motion to explain any apparent discrepancy); *Bover v. State*, 797 So. 2d 1246, 1251 n.5 (Fla. 2001) (admitting that an evidentiary hearing would be needed on a Rule 3.800(a) motion to challenge a habitual offender sentence where the convictions used to habitualize the defendant are not introduced).

Perhaps the greatest irony in the State's position is that it argues that no evidentiary hearing is necessary (or even allowed) but then proceeds to offer unsworn evidence which it suggests must control. As noted above, the State's untested evidence entirely misses the point because the evidence fails to address what the trial judge actually said at the hearing. But if the State is to offer this evidence, it cannot have it both ways. If the State is to be permitted to offer evidence and the Court is inclined to accept and consider it, then basic principles of fairness and due process demand that Blocker should be able to test this evidence in an evidentiary hearing. The law requires nothing less.

CONCLUSION

For all of the foregoing reasons, and for those set forth in the *Initial Brief of Petitioner*, 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 *Reply Brief* was furnished on this **24th** day of **March, 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 *Reply 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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