IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1409

DCA CASE NO. 2D08-3536
L.T. CASE NO. 25-2008-CA-000401

STATE OF FLORIDA,

Petitioner,

v.

WARREN STANG,

Respondent.
___________________________/

RESPONDENT'S BRIEF ON THE MERITS

On Discretionary Review from a
Decision of Florida's Second District Court of Appeal

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INTRODUCTION

The parties will be referred to by proper name or as they appeared below. The following symbols will be used:

(R. __) - Single Volume Record on Appeal (Page No.)

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

A. Probation Violation And Sentencing

In January 2000, Warren Stang pled guilty to twenty-four white-collar offenses that occurred between 1991 and 1994. See Stang v. State, 937 So. 2d 1170, 1171 (Fla. 4th DCA 2006). He was sentenced to five years in prison for fifteen of the counts, to run concurrently with credit for time served, followed by three years of probation for the remaining nine counts, also to run concurrently. See id. After serving his prison time, the State released Stang to probation, which he later violated. See id.

On March 30, 2005, the trial court sentenced Stang on his violation of probation and imposed a combination of concurrent and consecutive sentences on the pending nine counts, which the court indicated totaled twenty-seven years. (R. 60-61, 69-70). However, the order also granted Stang 1,915 days' credit for time served as to each count. (R. 61, 70). That the trial court left blank the "designated space" for specifying the counts to which the credit applies means this provision applies to "offenses committed on or after October 1, 1989 but before January 1, 1994." (R. 61, 70). Thus, absent specification, the credit applies to all such counts. (R. 61, 70). Under the order's terms, Stang would have served the time he had already incurred awaiting disposition and then would have been released

with no further supervision – the result of applying 1,915 days credit (approximately 5.24 years) to each count. (R. 61, 70).

B. Direct Appeal And The *Ex Parte* "Amended Sentence"

On April 21, 2005, Stang filed a direct appeal with the Fourth District Court of Appeal addressing an unrelated issue concerning his conviction and sentence. See Stang, 937 So. 2d at 1171-72. On June 6, 2005, with no notice to Stang – and while his direct appeal remained pending – FDOC faxed a letter to "Ana" at the Palm Beach County Clerk of Court. (R. 67-70). The fax attached the March 30, 2005 sentencing order and noted that it granted Stang credit for "1,915 days 'plus' the original county jail time and time served in [FDOC's] custody [for] counts 1 thru 3, 8, 30, 33, 34, 37, 39, 42, 51, 56, 60, 62 and 64, in accordance with Tripp v. State." (R. 67-70). The fax also noted that awarding this credit "would result in a potential immediate release." (R. 68). Therefore, FDOC requested the trial court "clarify" Stang's sentence within three working days. (R. 68).

One day after receiving this *ex parte* FDOC communication, the trial court entered an "amended sentence" that granted Stang a total of 1,915 days' credit against his entire sentence. (R. 71). This "amendment" required Stang to serve approximately twenty-two years in prison, rather than receiving an immediate release as the March 30, 2005 sentencing order had indicated. (R. 71). Neither Stang nor his counsel received notice of this "resentencing," and no one provided

the "amended sentence" to Stang. (R. 32-46). Further, the trial court entered this "amended sentence" sixty-nine days after Stang was sentenced for the violation of probation and while his direct appeal of that sentence was pending. (R. 71).

C. Administrative Challenges

Stang did not learn of this "amended sentence" until 2007 when, because of his own persistent prison administrative challenges regarding his credit for time served, FDOC informed him that the trial court had entered an "amended" nunc pro tunc sentencing order. (R. 32-46). When Stang attempted to enforce the March 30, 2005 sentence through the prison grievance system, FDOC stated it was required to enforce the "amended sentence." (R. 32-46).

D. Rule 3.850 Motion

Stang also filed a motion under Florida Rule of Criminal Procedure 3.850 regarding a "jail time served" issue. (R. 65); Stang v. State, 976 So. 2d 656, 656 (Fla. 4th DCA 2008). The trial court denied this claim as untimely, but the Fourth District reversed and remanded for reconsideration on the merits. See Stang, 976 So. 2d at 656. The State responded by relying on Stang's original March 30, 2005 sentence, contending that this sentence granted 1,915 days credit on the total sentence, and asserting that Stang should not receive "a windfall." (R. 57-64). Based on the record, it does not appear that the State ever addressed whether the June 7, 2005 "amended sentence" existed, whether it was legally entered, or

whether it comported with the sentence imposed during the sentencing hearing. (R. 57-63). The court "adopted" the State's response as its own, incorporating this response and its attachments in its order, and thus denied Stang's rule 3.850 motion on April 18, 2008. (R. 65).

E. Okeechobee County Habeas Petition

Stang did not appeal the denial of that motion because both the State's response and the trial court's order of denial attached and incorporated the original, validly entered March 30, 2005 sentence as the operative sentence in this case. (R. 60-61, 65, 86-87). Instead, he began seeking his immediate release due to an expired sentence. (R. 10-30, 48-50, 73-74). First, while incarcerated in Okeechobee County during late 2007 and early 2008, Stang filed a habeas petition with the Nineteenth Judicial Circuit contending his sentence had expired and that he was entitled to immediate release. (R. 48-50). In its response, the State "concede[d] that Stang relied on [an FDOC] Sentencing Specialist's [erroneous] instructions in filing [an] 'emergency' grievance" directly with the FDOC Secretary, rather than fully exhausting his FDOC administrative remedies. (R. 49). Since FDOC's misinformation caused the premature filing of Stang's original habeas petition, the circuit court dismissed this petition **without prejudice** to Stang fully exhausting his administrative remedies (i.e., exhausting all levels of the prison-grievance system) and then filing another habeas petition. (R. 49-50).

F. Hardee County Habeas Petition

After fully exhausting his FDOC administrative remedies, Stang filed a subsequent habeas petition on June 26, 2008, in the Tenth Judicial Circuit while incarcerated in Hardee County. (R. 10-30). He contended that the "amended sentence" was void because the trial court "entered" it during the pendency of his direct appeal. (R. 19, 23-25). He also asserted that entry of the "amended sentence" violated his due process rights because (i) neither he nor his counsel were provided notice of the court's intent to amend his sentence; and (ii) he was not provided an opportunity to be present and heard when his sentence was amended. (R. 19, 23, 29). Finally, he stressed that his March 30, 2005 sentence was not illegal and the sixty-day period for modifying a sentence under rule 3.800(c) had expired; therefore, the trial court lacked jurisdiction to "correct" any error on the sixty-ninth day and doing so violated his right to be free from double jeopardy. (R. 19, 25-26, 29). On these bases, Stang asserted that the March 30, 2005 sentence had long since expired and he was entitled to immediate release. (R. 19, 22-29). There is no indication in the record that the State responded to the Hardee County habeas petition.

On July 14, 2008, the Hardee County circuit court denied Stang's habeas petition, but did not address the merits. (R. 73-74). Instead, the court found these

claims had been "addressed appropriately at the administrative level," and that Stang could not challenge a sentence through a habeas petition. (R. 73-74).

G. Review Before The Second District

Stang then sought review by filing a timely certiorari petition with the Second District Court of Appeal. (R. 1-8). The State responded by maintaining that (i) Stang previously raised a "jail credit" issue in his rule 3.850 motion; and (ii) habeas corpus is an inappropriate remedy because Stang should have appealed the denial of his rule 3.850 motion to the Fourth District Court of Appeal. (R. 79-83). There is no indication in the record that the State has ever contended Stang's March 30, 2005 sentence was amended or modified pursuant to any valid procedural mechanism. Stang filed a reply highlighting that in 2008, the Fourth District ordered him to present "[a]ny challenge to [FDOC's] interpretation of the sentencing documents or the award of 'credit for time previously served in prison' . . . through an administrative grievance." Stang, 976 So. 2d at 656. (R. 86-87). Stang further replied that the proper remedy following his exhaustion of FDOC administrative remedies was to file an extraordinary writ with the circuit court in the county of incarceration asserting that he was entitled to immediate release under his original March 30, 2005 sentence, which the trial court had confirmed as the controlling sentence in its order denying his rule 3.850 motion. (R. 60-61, 65, 87-88).

The Second District first concluded that Stang's certiorari petition should be treated as a habeas petition because he sought immediate release under an expired sentence. Stang v. State, __ So. 3d __, No. 2D08-3536, 34 Fla. L. Weekly D1541, 2009 WL 2342472, at *2 (Fla. 2d DCA July 31, 2009) (citing Fla. R. App. P. 9.040(c)). Thus, the Second District viewed Stang's claims as seeking the appropriate enforcement of a validly entered, expired sentence in lieu of an invalid, void "sentence" "entered" without notice and without jurisdiction. See Stang, 2009 WL 2342472, at *2-*5. On this basis, the Court issued a three-part holding:

> 1. The trial court lacked jurisdiction under rule 9.600(d) to enter the June 7, 2005 "amended sentence" because it did so absent a proper motion under rule 3.800(b)(2) and while Stang's March 30, 2005 sentence was then pending before the Fourth District Court of Appeal;
>
> 2. The trial court "entered" the June 7, 2005 "amended sentence" in violation of Stang's due process rights because (a) he did not receive notice of FDOC's *ex parte* communication with the trial court or the trial court's resulting decision to "amend" his validly entered sentence, and (b) he was denied a meaningful opportunity to be heard on this issue and to directly appeal his "amended sentence"; and
>
> 3. The trial court's unilateral attempt to "amend" Stang's March 30, 2005 sentence, over two months after Stang had begun serving his sentence, violated his constitutional right to be free from double jeopardy.

See Stang, 2009 WL 2342472, at *3-*4. The district court recognized that Stang was entitled to immediate release and granted a writ of habeas corpus directing this result. See id. at *5.

The State moved for rehearing and to stay the district court's mandate and order of immediate release. (R. 100-07, 131-33). As part of its rehearing motion, the State acknowledged that "[a] void sentence may be remedied through a habeas corpus petition," but claimed that Stang's "amended sentence" was potentially illegal, not void. (R. 102-03) (citing Leichtman v. Singletary, 674 So. 2d 889, 891 (Fla. 4th DCA 1996)). In contrast, Stang contended – and the Second District held – that a sentence entered by a court without jurisdiction is void. (R. 3-5, 19, 24-25); Stang, 2009 WL 2342472, at *1-*4. Again, there is no indication in the record that the State has ever contended Stang's March 30, 2005 sentence was amended or modified pursuant to any valid procedural mechanism.

H. Proceedings In This Court

This Court later stayed the Second District's mandate and appears to have accepted discretionary review based on an alleged conflict with its decisions in Baker v. State, 878 So. 2d 1236 (Fla. 2004), State v. McBride, 848 So. 2d 287 (Fla. 2003), and State v. Mancino, 714 So. 2d 429 (Fla. 1998).

SUMMARY OF ARGUMENT

Based on the State's jurisdictional brief, it appears this Court accepted jurisdiction because of an alleged conflict between the Second District's decision below and this Court's decisions in Baker v. State, 878 So. 2d 1236 (Fla. 2004), State v. McBride, 848 So. 2d 287 (Fla. 2003), and State v. Mancino, 714 So. 2d 429 (Fla. 1998). However, upon closer examination of those decisions, there is no express and direct conflict, and this Court should discharge jurisdiction as improvidently granted.

Baker, McBride, and Mancino involved different rules of law and materially different controlling facts than those at issue in Stang. Unlike those decisions, the Second District's decision did not involve (i) a collateral attack on a conviction and sentence; (ii) an applicable procedural bar; or (iii) a situation where the trial court failed to award jail credit despite a clear record indication that such credit was owed. Rather, Respondent Warren Stang sought his immediate release under an expired sentence, which he conceded was validly entered pursuant to a lawful conviction. This remains a proper use of habeas corpus, and the alleged conflict decisions do not oppose the relief Stang obtained.

If the Court reaches the merits, it should approve the Second District's decision that habeas corpus remains an appropriate remedy to seek immediate release under the unique facts presented by this case. Specifically, habeas is

available here because the trial court entered one valid sentence – Stang's March 30, 2005 sentence – which, according to the Florida Department of Corrections, would have resulted in Stang's immediate release.

A court may not amend a sentence during a defendant's direct appeal and without having entertained any proper motion on this point. However, that is precisely what the trial court attempted on June 7, 2005 after receiving an *ex parte* communication from FDOC indicating that the court's March 30, 2005 sentence would result in potential immediate release. This action was void under Florida law, as the trial court lacked jurisdiction to enter the amended order and Stang was not afforded the necessary due process protection. Additionally, this *ex parte* resentencing raised double-jeopardy concerns because Stang had already begun serving his sentence. There is no indication the State ever sought to amend or modify Stang's sentence through proper procedural channels. Consequently, the March 30, 2005 sentence controls. That sentence has since expired, and thus, Stang is entitled to immediate release under his habeas petition.

ARGUMENT

I. CONFLICT JURISDICTION DOES NOT EXIST HERE

The State contended the Second District's decision below conflicts with this Court's decisions in Baker v. State, 878 So. 2d 1236 (Fla. 2004), State v. McBride, 848 So. 2d 287 (Fla. 2003), and State v. Mancino, 714 So. 2d 429 (Fla. 1998). (See Pet's Juris. Br. at 3-9). This Court later accepted jurisdiction, but did so, in part, based upon its review of a *pro se* Respondent's jurisdictional brief. As further explained below, the Court should now discharge jurisdiction as improvidently granted because Baker, McBride, and Mancino do not expressly and directly conflict with the Second District's decision.

Conflict jurisdiction arises in two principal circumstances: (i) the announcement of a rule of law that conflicts with a rule previously announced by this Court or another district court; or (ii) the application of a rule of law to produce a different result in a case that involves substantially similar controlling facts as a prior case disposed of by this Court or another district court. See Wallace v. Dean, 3 So. 3d 1035, 1039 & nn.3, 4 (Fla. 2009) (citing, e.g., Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960)); art. V, § 3(b)(3), Fla. Const. Neither of these circumstances are present.

Based on the four corners of the Second District's decision, Stang did not involve a collateral attack on a defendant's conviction and sentence because

(i) Stang did not dispute the validity of his parole-violation conviction, and (ii) he sought enforcement of the only validly noticed and entered sentence in this case – the March 30, 2005 sentence. See Stang, 2009 WL 2342472, at *1-*5. According to the Second District, Stang conceded the validity of his March 30, 2005 sentence and sought his immediate release under that expired sentence because the *ex parte*, non-noticed "amended sentence" entered on June 7, 2005 was void from its inception. Id. at *1-*2. After exhausting his administrative remedies, Stang thus petitioned the circuit court located in the county of incarceration for a writ of habeas corpus seeking a legal determination of whether FDOC's interpretation and enforcement of his criminal sentence was correct. See id. at *2.

The alleged conflict decisions simply do not involve similar factual situations. For example, Baker involved three separate, original habeas petitions that did, in fact, present collateral attacks on convictions and sentences. See 878 So. 2d at 1237-38. Petitioner Baker collaterally attacked his conviction and sentence because of the trial court's alleged failure "to properly qualify the prospective jurors in his case during jury selection." Id. at 1237-38. Petitioner Brooks collaterally attacked his convictions and sentences because the trial court purportedly failed "to ensure that the prospective jurors in his case were properly sworn prior to jury selection." Id. at 1238. Petitioner Sly collaterally attacked his convictions and sentences "because his guilty plea was not knowingly and

voluntarily entered and because there existed a conflict of interest between himself and his trial counsel." Id. Unlike Stang, none of these petitioners sought immediate release under an expired sentence (which is not a collateral attack).

Further, the Baker Court explicitly limited its analysis to habeas petitions "filed by noncapital defendants seeking relief that can be obtained only, if at all, by motion in the sentencing court under Florida Rule of Criminal Procedure 3.850." 878 So. 2d at 1237. Thus, the Court's further statement that it adopted former rule 1 and present rule 3.850 "with limited exceptions" to provide "the mechanism through which [prisoners] must file collateral post-conviction challenges to their convictions and sentences," 878 So. 2d at 1245, clarified that the Court did not address other situations that are not truly collateral attacks in which habeas remains an appropriate remedy.

For our purposes, it is significant Baker left untouched established law that habeas remains proper to:

- Seek immediate release under an expired sentence;[1]
- Challenge "void" orders;[2] and

[1] See, e.g., Diggs v. FDOC, 503 So. 2d 412, 413-14 (Fla. 1st DCA 1987); Kirkman v. Wainwright, 465 So. 2d 1262, 1263-64 (Fla. 5th DCA 1985).

[2] See, e.g., Dallas v. Wainwright, 175 So. 2d 785, 785 (Fla. 1965) ("We decide this matter on habeas corpus without relegating the petitioner to [rule] 1, because of the fundamental error appearing on the face of the sentence which renders it void.").

- Obtain a legal determination of whether FDOC's interpretation and enforcement of a criminal sentence is correct (but, a prisoner must exhaust his or her administrative remedies before doing so).[3]

Per the cited decisions, these remain proper uses of the writ following this Court's adoption of rule 1 (now rule 3.850), and Baker did not address or involve these issues. Therefore, Baker does not conflict with Stang. See, e.g., Wallace, 3 So. 3d at 1039 & nn.3, 4.

Mancino likewise does not conflict with Stang. In Mancino, the Court examined whether rule 3.800(a) is an appropriate remedy to address claims that a prisoner is entitled to jail credit based on the record, even though the trial court failed to award such credit. See 714 So. 2d at 430. The Court held rule 3.800(a) may be used in this fashion, but also indicated that extraordinary writs applied as well. See id. at 433 ("[A] prisoner who can demonstrate her entitlement to release when properly credited with time served would be entitled to relief by habeas corpus." (citing Sullivan v. State, 674 So. 2d 214 (Fla. 4th DCA 1996))). Stang did not involve that situation. Quite the contrary, the issue below was whether Stang

[3] See, e.g., Sutton v. Fla. Parole Comm'n, 975 So. 2d 1256, 1260 (Fla. 4th DCA 2008) ("If the agency incorrectly administers a sentence legally imposed so that the prisoner spends more time in prison than the sentence provides, his remedy is within the agency first and, if not corrected by the agency, on judicial review by extraordinary writ."); Canete v. FDOC, 967 So. 2d 412, 415 (Fla. 1st DCA 2007) (similar); cf. also Bush v. State, 945 So. 2d 1207, 1210 (Fla. 2006) ("When challenging a sentence-reducing credit determination by [FDOC], . . . if the prisoner alleges entitlement to immediate release, a petition for writ of habeas corpus is the proper remedy." (citation footnote omitted)).

was entitled to immediate release under an expired sentence that **did award credit for time served as to each count**. See Stang, 2009 WL 2342472, at *1-*5. As such, Mancino does not conflict with Stang. See, e.g., Wallace, 3 So. 3d at 1039 & nn.3, 4.

Lastly, McBride considered whether law of the case, *res judicata*, and collateral estoppel barred "a successive rule 3.800(a) motion to correct an illegal sentence when the defendant raised the identical issue in a prior rule 3.800(a) motion that was denied by the trial court but never appealed." 848 So. 2d at 288. First, and most obvious, Stang did not involve a rule 3.800(a) motion attacking an illegal sentence, and there is no contention that law of the case applies here. See Stang, 2009 WL 2342472, at *1-*5. Instead, Stang involved a habeas petition alleging entitlement to immediate release under an expired sentence. See id. There is no indication the State ever filed a motion under rule 3.800 to correct or otherwise modify Stang's originally imposed sentence and, further, the State never appealed from this sentence. See Stang, 2009 WL 2342472, at *4. Moreover, the trial court lacked jurisdiction to unilaterally "amend" Stang's sentence without notice to either party and during the pendency of Stang's direct appeal. See id. at *3 (citing Fla. R. Crim. P. 3.800(b)(2); Fla. R. App. P. 9.600(d); Brown v. State, 744 So. 2d 1209, 1209 (Fla. 2d DCA 1999)). Thus, the original sentence remained as litigated by the parties, and, to the extent *res judicata* or collateral estoppel might

apply, they apply to bind the State, not Stang. See McBride, 848 So. 2d at 290 ("[U]nder *res judicata*, a judgment on the merits bars a subsequent action between the same parties on the same cause of action. . . . Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided."). The State had an opportunity to file a 3.800(b) motion to correct a scrivener's error, or to appeal the March 30, 2005 sentence, but it never did so. See Stang, 2009 WL 2342472, at *3-*4.

A final point concerning McBride is that the Court held each of the procedural-bar doctrines it addressed remain subject to a "manifest injustice" exception. See 848 So. 2d at 291-92. Florida precedent recognizes that manifest injustice results when the State holds a prisoner under an invalid, unlawful, or void sentence and, absent the sentence, the prisoner would be released. See, e.g., Lago v. State, 975 So. 2d 613, 614 (Fla. 3d DCA 2008) (treating an appeal from the denial of a 3.800 motion as an original habeas petition, recognizing that the petitioner had previously addressed the issue on direct appeal and through numerous post-conviction motions, and, nevertheless, holding that petitioner's sentence was "patently illegal" and could be corrected at any time to avoid "manifest injustice"). That is precisely the situation here. Therefore, McBride is inapplicable and does not conflict with Stang. See 2009 WL 2342472, at *1-*5; Wallace, 3 So. 3d at 1039 & nn.3, 4.

In sum, the Second District's decision in this case does not expressly and directly conflict with the decisions identified by the State because those decisions addressed different rules of law and applied those rules under materially different factual circumstances. Therefore, Respondent respectfully requests the Court discharge jurisdiction as improvidently granted. Cf., e.g., Curry v. State, 682 So. 2d 1091, 1091-92 (Fla. 1996) (discharging jurisdiction as improvidently granted because the alleged conflict decisions "address[ed] different propositions of law which are not in conflict").

II. HABEAS REMAINS AN APPROPRIATE REMEDY WHEN A PRISONER SEEKS IMMEDIATE RELEASE UNDER THE ONLY VALIDLY ENTERED SENTENCE IMPOSED BY THE TRIAL COURT

A. Standard of Review: De Novo

The issue presented by this case is whether habeas corpus remains an appropriate remedy to seek immediate release under an expired sentence. This is a question of law subject to *de novo* review. Cf., e.g., S. Baptist Hosp. of Fla., Inc. v. Welker, 908 So. 2d 317, 319-20 (Fla. 2005).

In contrast, the State has misconstrued the issue by attempting to transform this into a case involving a collateral attack on a conviction and corresponding sentence, for which only a 3.850 motion would be appropriate. See, e.g., Baker, 878 So. 2d at 1244-46. However, the relevant issue, stated in full, is whether habeas corpus remains an appropriate remedy to seek immediate release under an

expired sentence where (i) the trial court validly entered a now-expired sentence; but (ii) later purported to enter an "amended sentence" without notice to either of the parties, while the defendant's direct appeal was pending. See generally Stang v. State, __ So. 3d __, No. 2D08-3536, 34 Fla. L. Weekly D1541, 2009 WL 2342472 (Fla. 2d DCA July 31, 2009). Even if the Court does not discharge jurisdiction, Florida precedent supports the use of habeas petitions under these unique circumstances.

B. Stang Sought Immediate Release From Prison Due To An Expired Sentence, Which Is Not A Collateral Attack

Stang did not collaterally attack the trial court's judgment of conviction and sentence; rather, he asserted that he remained improperly incarcerated under an expired sentence. Even FDOC recognized that the original March 30, 2005 sentence "would [have] result[ed] in a potential immediate release," which is why it later communicated with the trial court's clerk on an *ex parte* basis to seek a "clarified" sentence. (R. 67-70). Thus, under that controlling sentence, Stang is entitled to immediate release. In such situations, a writ of habeas corpus filed in the circuit court with jurisdiction over the petitioner's detention facility is an appropriate remedy. See Diggs v. FDOC, 503 So. 2d 412, 413-14 (Fla. 1st DCA 1987) (treating mandamus petition as habeas petition and granting the writ because the petitioner was entitled to immediate release under an expired sentence); Kirkman v. Wainwright, 465 So. 2d 1262, 1263-64 (Fla. 5th DCA 1985) (granting

writ of habeas corpus when prisoner demonstrated entitlement to immediate release under expired sentence even though trial court may have intended to enter a lengthier sentence); Nedd v. Wainwright, 449 So. 2d 982, 982-83 (Fla. 1st DCA 1984) (granting writ of habeas corpus because the petitioner was entitled to immediate release under an expired sentence).

C. The March 30, 2005 Expired Sentence Controls Because The June 7, 2005 "Amended Sentence" Was Entered Without Jurisdiction And Was Therefore Void

The trial court lacked jurisdiction to amend Stang's sentence. At FDOC's informal request, the trial court "entered" the "amended sentence" on June 7, 2005, while Stang's direct appeal was pending before the Fourth District Court of Appeal. (R. 71); Stang v. State, 937 So. 2d 1170 (Fla. 4th DCA 2006). Neither Stang nor his former counsel received notice of this action. (R. 17, 32-46).

Florida Rule of Appellate Procedure 9.600(d) provides that the trial court "retain[s] jurisdiction to consider motions pursuant to Florida Rules of Criminal Procedure 3.800(b)(2) and in conjunction with post-trial release pursuant to rule 9.140(h)." This case does not involve post-trial release under rule 9.140(h). Hence, the only basis for the trial court to "amend" Stang's sentence during the pendency of his direct appeal was to entertain a motion under rule 3.800(b)(2). See Day v. State, 770 So. 2d 1262, 1262 (Fla. 1st DCA 2000) ("Florida Rule of Appellate Procedure 9.600(d) giv[es] trial courts jurisdiction to consider only rule

3.800(b)(2) motions to correct an illegal sentence during the pendency of an appeal.").[4] There is no indication the State ever filed such a motion, and it does not assert otherwise on appeal.

In fact, this is the first time the State has contended the trial court's original sentence contained a scrivener's error. (See Pet's Initial Br. at 15-18). Indeed, the Second District explained "nothing in the record indicates that the error in question was simply a scrivener's error, nor has the State ever asserted so in any of its filings with the post-conviction court, the Fourth District, or in this appeal." Stang, 2009 WL 2342472, at *3. "As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal." Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005).

In any event, even if the March 30, 2005 sentencing order contained a scrivener's error, the State's proper remedy was to move for correction under rule 3.800(b), with notice to Stang, which it did not do. If the State had done so, Stang would have been able to respond and would have been entitled to directly appeal from any new sentencing order. See Fla. R. Crim. P. 3.800(b) (providing for service of such motions and an opportunity to respond); Fla. R. App. P. 9.140(E), (F) (providing for appeals from unlawful sentences, illegal sentences, or other

[4] The State may only file rule 3.800(b) motions "if the [requested] correction of the sentencing error would benefit the defendant or to correct a scrivener's error." Fla. R. Crim. P. 3.800(b).

sentences "if the appeal is required or permitted by general law"); Butler, 973 So. 2d at 678 (indicating that a defendant "should have been informed of a right to file a direct appeal from [an] amended sentence"). Instead, Stang only learned of his June 7, 2005 "amended sentence" in 2007 through persistent administrative challenges filed with FDOC. (R. 32-46).

Ironically, the State faults Stang for supposedly failing to use proper procedural mechanisms to enforce his expired sentence when, in fact, the State never used an appropriate procedural device to seek and obtain an amended sentence. Cf. Fuston, 838 at 1207 ("[FDOC] has no authority to impose a more onerous sentence upon a prisoner than the sentence actually imposed by the trial court. If the State believes a sentence is erroneous, it is obligated to preserve this issue and appeal it to an appropriate appellate court."); Canete, 967 So. 2d at 416 (holding that FDOC has a ministerial duty to enforce jail-credit awards as written by the sentencing court).

Furthermore, the trial court never indicated it was correcting a scrivener's error when it *ex parte* amended Stang's sentence while his direct appeal was pending and without a proper motion having been filed for its consideration under rule 3.800(b)(2). An "amended sentence" entered while a direct appeal is pending

is void,[5] and, as this Court held following the adoption of rule 1, a habeas petitioner may properly challenge sentences that are void upon the face of the record. See Dallas v. Wainwright, 175 So. 2d 785, 785 (Fla. 1965) (granting habeas petition concerning a "void" sentence and holding: "We decide this matter on habeas corpus without relegating the petitioner to [rule] 1, because of the fundamental error appearing on the face of the sentence which renders it void."); see also Leichtman v. Singletary, 674 So. 2d 889, 890 (Fla. 4th DCA 1996) (indicating that habeas remains a proper remedy to challenge void orders); Yates v. Buchanan, 170 So. 2d 72, 72-74 (Fla. 3d DCA 1964) (permitting habeas challenge to void sentence and commitment order and holding that "the circuit court may question and determine the legality of the detention and release the party from orders of detention which are illegal and void") (relied upon as a correct statement of the rule in Alachua Reg'l Juvenile Det. Ctr. v. T.O., 684 So. 2d 814, 816-17 (Fla. 1996)).

[5] Price v. State, 838 So. 2d 587, 588 (Fla. 3d DCA 2003); Stewart v. State, 817 So. 2d 1056, 1056-57 (Fla. 1st DCA 2002); Knapp v. State, 741 So. 2d 1150, 1151-52 (Fla. 2d DCA 1999). Each of these decisions holds that new sentences entered while a defendant's direct appeal is pending are legal nullities. As such, the State's concern regarding an "absurd distinction" between "illegal" and "void" sentences is unfounded. (Pet's Initial Br at 20). An "order" entered absent any jurisdictional authority to do so is void from its inception. See, e.g., Jory v. State, 699 So. 2d 820, 822 (Fla. 5th DCA 1997) (striking amended sentences entered during the pendency of defendant's direct appeal "as void for lack of jurisdiction"); Bales v. State, 489 So. 2d 888, 889 (Fla. 1st DCA 1986) (holding that sentence imposed absent jurisdiction was void).

D. The Amended Sentence Is Also Void As Violative Of Stang's Due Process Rights

Rule 3.800(b) motions require proper notice and an opportunity to be heard, which are basic components of procedural due process. See Fla. R. Crim. P. 3.800(b)(2)(A)-(B), 3.800(b)(1)(B); cf. also Griffin v. State, 517 So. 2d 669, 670 (Fla. 1987) ("The pronouncement of sentence upon a criminal defendant is a critical stage of the proceedings to which all due process guarantees attach . . . ."); Butler v. State, 973 So. 2d 677, 678 (Fla. 2d DCA 2008) (explaining that a defendant possesses a due process right to be represented by counsel during resentencing and to be informed of his or her right to appeal the new sentence); Fuston v. State, 838 So. 2d 1205, 1207 (Fla. 2d DCA 2003) (highlighting the probability that an amended sentence violates due process when the defendant is never advised that an amended sentence is appealable).

This did not happen here. An *ex parte* exchange with FDOC that produces a new sentence during the pendency of a defendant's direct appeal – of which the defendant is unaware – is antithetical to due process and constitutes a legal nullity that is void from its inception. Cf., e.g., Price v. State, 838 So. 2d 587, 588 (Fla. 3d DCA 2003) (holding that trial court lacked jurisdiction to alter a defendant's sentence while that sentence was pending direct appeal); Stewart v. State, 817 So. 2d 1056, 1056-57 (Fla. 1st DCA 2002) (same); Knapp v. State, 741 So. 2d 1150, 1151-52 (Fla. 2d DCA 1999) (same).

On these additional grounds, the amended sentence cannot stand. Stang's claim for habeas relief was proper because the only validly entered sentence had expired. Diggs, 503 So. 2d at 413-14 (habeas remains proper to seek immediate release under expired sentence); Kirkman, 465 So. 2d at 1263-64 (same); Nedd, 449 So. 2d at 982-83 (same); see also Dallas, 175 So. 2d at 785 (habeas remains appropriate to challenge void sentencing orders); Murray v. Regier, 872 So. 2d 217, 220-21 (Fla. 2002) (holding that when the habeas court lacks "supervisory or appellate jurisdiction over the court that issued the order under challenge" the habeas court is "limited to [determining] whether the court that entered the order was without jurisdiction to do so or whether the order is void or illegal" (citing T.O., 684 So. 2d at 816-17)).

E. Stang's Claim Is Not Procedurally Barred

The State repeatedly asserts the Second District should not have considered Stang's certiorari petition (later converted to a habeas petition)[6] because Stang previously filed a rule 3.850 motion in Palm Beach County addressing a "jail credit" issue and a habeas petition in Okeechobee County seeking enforcement of

[6] It is appropriate to convert an appeal or other review mechanism to an original habeas petition when the party is seeking immediate release based on an invalid or expired sentence. See, e.g., Lago, 975 So. 2d at 613-14 (treating an appeal from the denial of a 3.800 motion as an original habeas petition because the appellant-prisoner was entitled to immediate release based on a "patently illegal" sentence); Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought.").

his sentence and, further, Stang did not raise these issues on direct appeal. The state is incorrect.

With regard to the 3.850 motion, the State responded by relying on the March 30, 2005 sentence, contending that this sentence granted 1,915 days credit on the total sentence and asserting that Stang should not receive "a windfall." (R. 57-63). The State did not address the issues of whether the June 7, 2005 "amended sentence" existed, whether it was legally entered, or whether it comported with the sentence imposed during the sentencing hearing. (R. 57-63). In turn, the post-conviction court agreed with the State and incorporated and adopted its response, including the attached March 30, 2005 sentence. (R. 65). Thus, these 3.850 proceedings did not address the application or invalidity of the June 7, 2005 "amended sentence" and, in fact, confirmed the validity of the March 30, 2005 sentence. Further, a habeas petition, not a rule 3.850 motion, is the appropriate remedy to seek immediate release under an expired sentence or to challenge FDOC's administrative interpretation of a sentence. See, e.g., Diggs, 503 So. 2d at 413-14; Sutton, 975 So. 2d at 1260.

Next, the Okeechobee County circuit court denied Stang's initial habeas petition **without prejudice** because an FDOC sentencing specialist had mistakenly advised Stang to file a complaint directly with the FDOC Secretary in Tallahassee, rather than fully exhausting his lower-level administrative remedies. (R. 49-50). As

a result, Stang believed he had exhausted his administrative remedies when, in fact, he had not. (R. 49-50). In other words, the circuit court recognized that FDOC's misinformation caused the premature filing of Stang's original habeas petition, and therefore dismissed this earlier petition without prejudice to Stang fully exhausting his administrative remedies and then filing another habeas petition. (R. 49-50). Stang later exhausted his administrative remedies and filed a habeas petition in the Tenth Judicial Circuit while incarcerated in Hardee County. (R. 10-30). Consequently, Stang's Hardee County habeas petition was not barred by his earlier filing of the Okeechobee habeas petition.

Finally, the State's "direct appeal" contentions are meritless because the June 7, 2005 "amended sentence" was entered without jurisdiction during the pendency of Stang's direct appeal, and Stang was unaware of this "amended sentence" until 2007. (R. 17, 32-46). It was thus impossible for him to raise this issue during his direct appeal.

In contrast to the maze of procedural technicalities the State would now raise to Stang's use of habeas corpus, this Court has explained:

> The procedure for the granting of this particular writ it not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as

> important as the determination of the ultimate question as to the legality of the restraint.

Anglin v. Mayo, 88 So. 2d 918, 919-20 (Fla. 1956).

III. THE STATE'S MULTI-PART CLAIM THAT THE MARCH 30, 2005 SENTENCE WAS NOT "LEGALLY AND FACTUALLY" POSSIBLE CANNOT BE RAISED FOR THE FIRST TIME HERE

A. The State Never Raised These Concerns With The Trial Court And Never Appealed Stang's Sentence

In its brief to this Court, the State contends for the first time that the March 30, 2005 sentence was not legally and factually possible. (See Pet's Initial Br. at 15-19). See Robbins, 914 So. 2d at 928 ("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal."). As such, this argument is improper. If the State wished to raise this point with the trial court, it should have followed the procedures outlined in rule 3.800, but it never did so. As an alternative, the State could have appealed Stang's March 30, 2005 sentence as erroneous, but again, it never did so. Cf. Fuston, 838 So. 2d at 1207. Instead, without notice to either party, and while Stang's direct appeal was pending, FDOC contacted the trial court's clerk on an *ex parte* basis to seek a "clarified" sentence, of which Stang remained unaware until 2007. (R. 32-46, 67-70). While district courts have recognized FDOC's apparent authority to seek clarification from trial courts to ensure that "[FDOC] does not keep a prisoner **longer** than the time

specified in the sentence,"[7] FDOC has no authority to circumvent the remedial processes outlined by the Florida Rules of Appellate and Criminal Procedure for addressing improper or erroneous sentences:

> [FDOC] has no authority to impose a more onerous sentence upon a prisoner than the sentence actually imposed by the trial court. If the State believes a sentence is erroneous, it is obligated to preserve this issue and appeal it to an appropriate appellate court.

Fuston, 838 So. 2d at1207; cf. also Sutton, 975 So. 2d at 1257 ("[P]rison officials must enforce the actual sentence imposed but may not administer that sentence **in a way that would increase** the punishment beyond what the court imposed. Prisoners are entitled to have the judicial system review the imposition and administration of their punishment in compliance with these laws."); Pearson v. Moore, 767 So. 2d 1235, 1239 (Fla. 1st DCA 2000) ("As part of the executive branch, [F]DOC lacks the power to adjudicate the legality of a sentence or to add or delete sentencing conditions. Sentencing is a power, obligation, and prerogative of the courts, not [F]DOC." (internal citations omitted)).

B. Stang Never Contended That He Actually Served 17,235 Days Of Prior Incarceration

The State's remaining concerns are immaterial at this stage in the proceedings. First, Stang never contended that he actually served "17,235 days of prior incarceration." (Pet's Initial Br. at 15 n.1). Rather, he recognizes that the

[7] Fuston, 838 So. 2d at 1207.

March 30, 2005 sentencing order afforded him 1,915 days' credit for time served as to each count. FDOC agreed with this assessment, which is why it communicated with the trial court's clerk on an *ex parte* basis to seek a "clarified" sentence. (R. 67-70).

C. The Record Belies The State's "Designated Space" Contention

The State's contention that the trial court left blank the "designated space" for specifying the counts to which the credit applies disregards that this provision applies to "offense**s** committed on or after October 1, 1989 but before January 1, 1994." (R. 70). Absent specification, the credit applies to all such counts. Again, FDOC agreed with this assessment, which is why it communicated with the trial court's clerk on an *ex parte* basis to seek a "clarified" sentence. (R. 67-70).

D. Consistent With Double Jeopardy Principles, Trial Courts May Not Sua Sponte Rescind Jail Credit Even If The Initial Award Was Improper

Next, the State contends this Court's decision in Hodgdon v. State, 789 So. 2d 958, 963 (Fla. 2001), holds that, upon revocation of probation, a defendant is not entitled to credit for time served as to each count of consecutively imposed guidelines sentences. (See Pet's Initial Br. at 16-17). Stang agrees with this assessment as far as it goes. However, the State overlooks the different procedural posture presented by Hodgdon and similar decisions. There, the trial court did **not** award credit for time served as to each count, and, in response, the defendant

challenged the withholding of such credit as contrary to Tripp v. State, 622 So. 2d 941 (Fla. 1993). See Hodgdon, 789 So. 2d at 961-62. Conversely, here, the trial court **did** award such credit through its March 30, 2005 sentencing order. (R. 60-61, 69-70). Several district courts have held that even if this type of award is improper, it is not unlawful, illegal, or invalid once imposed, and that rescinding this credit once the defendant begins serving his or her sentence violates the defendant's right to be free from double jeopardy[8]:

> [A] trial court has no authority to rescind a defendant's jail credits after the sixty-day period for modifying a sentence provided in Florida Rule of Criminal Procedure 3.800(c), **even when the jail credits were improperly awarded**. **The award of improper jail credits does not make the defendant's sentence illegal** and therefore subject to modification at any time. . . . Moreover, any attempt to rescind jail credits already awarded constitutes an enhancement of the defendant's sentence that violates the prohibition against double jeopardy.

Douze v. State, No. 4D09-1816, __ So. 3d __, 34 Fla. L. Weekly D2577, 2009 WL 4827052, at *2 (Fla. 4th DCA Dec. 16, 2009) (quoting King v. State, 913 So. 2d 758, 760 (Fla. 2d DCA 2005)); see also, e.g., Wheeler v. State, 880 So. 2d 1260, 1261 (Fla. 1st DCA 2004) (substantially similar). Rescinding jail credit is not the type of error that may be corrected at any time under rule 3.800(a) because it does not involve an illegal sentence, a mathematical scoresheet miscalculation, or the

[8] See U.S. Const. amend. V; art. I, § 9, Fla. Const.

grant of additional jail-time credit pursuant to Mancino, 714 So. 2d at 429. See Fla. R. Crim. P. 3.800(a) & 2000 amend. cmt.

This is precisely what the trial court did here by attempting to rescind previously granted jail credit through its June 7, 2005 "amended sentence." See Stang, 2009 WL 2342472, at *4. Accordingly, even if Stang was not originally entitled to credit for time served on each count, that does not render the trial court's March 30, 2005 grant of this credit unlawful, illegal, or invalid. See, e.g., Douze, 2009 WL 4827052, at *2. Based on the above-described precedent, the trial court could not later rescind this credit under rule 3.800 because doing so would violate the double-jeopardy principles embodied in article I, section 9 of the Florida Constitution.

In opposition to this precedent, the State cites the Fifth District's decision in Gallinat v. State, 941 So. 2d 1237 (Fla. 5th DCA 2006). There, the Fifth District relied on a 2000 amendment to rule 3.800(a), which added the following emphasized language: "A court may at any time correct . . . **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**." 941 So. 2d at 1238-39. By doing so, the Fifth District overlooked the intent underlying this amendment. The comment to rule 3.800(a) describing the 2000 amendment states: "The amendment to subdivision (a) is intended to conform the rule with

State v. Mancino, 714 So. 2d 429 (Fla. 1998)." As explained earlier, Mancino held that rule 3.800(a) is an appropriate mechanism for a defendant to seek jail credit to which he or she is entitled based on the face of the record that **reduces** his or her sentence, which the trial court nevertheless failed to award. See 714 So. 2d at 430, 433. Nothing in Mancino indicates this Court intended for trial courts to peruse the record "at any time" seeking to rescind jail credit that the court previously afforded as part of a valid sentencing order. Therefore, Gallinat's reading of rule 3.800(a) is mistaken, and that decision is an otherwise-unsupported outlier.

Relatedly, the State's reliance on State v. Collins, 985 So. 2d 985 (Fla. 2008), and Monge v. California, 524 U.S. 721 (1998), is misplaced. By citing those decisions for the proposition that "resentencing" does not violate double jeopardy, the State fails to explain that the "resentencing" addressed by Collins and Monge was "resentencing" following the vacation of a sentence on direct appeal. (See Pet's Initial Br. at 18-19). For example, in Collins, the defendant appealed his habitual-felony-offender sentence as insufficiently supported by the evidence presented during his sentencing hearing. See 985 So. 2d at 986-87. On appeal, the Second District agreed with Collins, reversed his HFO sentence, and held the State could not present additional HFO evidence on remand. See id. at 987. The Second District's decision conflicted with those from other district courts and, consequently, this Court later accepted review. See id. at 986. On review, the Court

held that when a non-capital sentence is appealed and vacated, a *de novo* resentencing hearing must occur on remand, during which the defendant is entitled to "the full array of due process rights." Id. at 989, 990, 993-94. The Collins Court also held that non-capital *de novo* resentencing following the vacation of a sentence on direct appeal does not violate double jeopardy. See id. at 992-93. Collins had nothing to do with a trial court's decision to rescind credit for time served previously provided in a validly entered, non-appealed sentencing order. Moreover, Collins largely based its holding on the United States Supreme Court's similar decision in Monge, which likewise had nothing to do with a trial court's decision to rescind credit for time served. The State's reliance on these decisions is misplaced and distracts from the actual double-jeopardy issue addressed by the Second District below. See Stang, 2009 WL 2342472, at *4.

E. The Trial Court's Oral Impositions Of Sentence Do Not Necessarily Conflict With The March 25, 2005 Sentencing Order. Moreover, The State Never Raised This Contention Through Any Appropriate Procedural Mechanism

Finally, for the first time on review before this Court, the State contends Stang's orally imposed sentence may contradict the March 30, 2005 written sentence, and that the oral imposition controls. Cf. Robbins, 914 So. 2d at 928 (issues should not be raise for the first time on appeal). As a general proposition, the State is correct that an orally imposed sentence controls when it conflicts with its written memorialization. See, e.g., Williams v. State, 957 So. 2d 600, 603 (Fla.

2007). Again, however, the State never moved under rule 3.800(b) to correct a scrivener's error, and the trial court lacked jurisdiction to amend the sentence during Stang's direct appeal absent a motion under this rule. See Day, 770 So. 2d at 1262. Moreover, the trial court never stated it was correcting a scrivener's error; instead, it simply amended Stang's sentence while his direct appeal was pending. (R. 71).

While a written sentence that conflicts with an orally imposed sentence may be "illegal" within the meaning of rule 3.800(a), and thus correctable at any time upon the motion of a party, that is only true where the two conflict based on the record. Cf., e.g., Comtois v. State, 891 So. 2d 1130, 1131 (Fla. 5th DCA 2005) ("While Rule 3.800(a), . . . authorizes a sentencing court to correct an illegal sentence, the rule 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." (footnote omitted)). The hearing transcript provided by FDOC in its appendix to its amicus brief does not necessarily reflect a conflict.[9] Rather, it indicates (i) the trial court issued two inconsistent oral

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[9] By citing this appendix, Stang does not waive his objection to FDOC participating as amicus in this case. See Stang's Response In Opposition to FDOC's Amicus Motion (filed 02/09/10) (highlighting that (i) interested parties who are directly affected by a matter may not serve as amici, and (ii) amici may not raise new issues not addressed by the parties below (citing, e.g., Premier Indus. v. Mead,

pronouncements that differed concerning the counts the court stated were imposed "consecutively," and (ii) the trial court intended to impose some combination of consecutive sentences that totaled twenty-seven years with 1,915 days of credit for time served to apply in some fashion to theses combined sentences. Compare FDOC Appendix at 118 (first oral pronouncement – failing to specify whether the sentence on count 72 was imposed concurrently or consecutively and failing to specify whether any of the counts grouped into "consecutive" sentences were to be "consecutive" to each other or as to the other "consecutive" sentences), with id. at 119 (second oral pronouncement – failing to specify whether the combined sentence as to counts 44 and 65 was imposed concurrently or consecutively and failing to specify whether any of the counts grouped into "consecutive" sentences were to be "consecutive" to each other or as to the other "consecutive" sentences).

Based on these two differing oral pronouncements it is unclear whether the sentence imposed by the trial court actually totaled twenty-seven years, let alone how the trial court intended for the 1,915 days of credit to apply to Stang's sentences. Thus, there is no explicit conflict with the March 30, 2005 written sentence. The bottom-line is that neither party can definitively state what the trial court intended to accomplish because the State never sought to amend or challenge

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595 So. 2d 122, 125 (Fla. 1st DCA 1992); Turner v. Tokai Fin. Servs., Inc., 767 So. 2d 494, 496 (Fla. 2d DCA 2000))).

Stang's sentence through proper procedural channels (i.e., a 3.800 motion or an appeal), which – in contrast to what actually occurred – would have afforded the basic hallmarks of due process, notice and an opportunity to be heard. The State should not be able to extricate itself from an expired sentence for the first time on review here when it did not previously seek to amend Stang's sentence through proper channels.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court discharge jurisdiction as improvidently granted or, alternatively, approve the Second District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail and e-mail this 15th day of February, 2010 to: **Sara Macks, Esquire,** Assistant Attorney General, *Counsel for Petitioner*, Concourse Center 4, 3507 East Frontage Rd, Suite 200, Tampa, Florida 33607, sara.macks@myfloridalegal.com; and **Carolyn J. Mosely, Esquire,** Florida Department of Corrections, Attorney Supervisor, Office of General Counsel, 2601 Blair Stone Rd., Tallahassee, FL 32399-2500, mosley.carolyn@mail.dc.state.fl.us.

By: ______________________________
DAVID L. LUCK

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

____
DAVID L. LUCK

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