IN THE SUPREME COURT OF FLORIDA

CHARLES MAPP,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC09-1838

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The statement of the case and facts set forth by the Second District Court in *Mapp v. State*, 18 So. 3d 33 (Fla. 2d DCA 2009), states:

> In Polk County Circuit Court case number 06-9191, the information charged Mr. Mapp with burglary of a conveyance and grand theft of a quantity of mechanic's tools, both third-degree felonies, and dealing in stolen property, a second-degree felony. In circuit court case number 06-35 9192, the information charged burglary, grand theft of an auto, and possession of cocaine, third-degree felonies, and possession of drug paraphernalia, a first-degree misdemeanor. He entered a straight up plea to all the charges. Neither he nor his defense counsel received notice that the State intended that he be sentenced as a habitual felony offender (HFO) until, at the sentencing hearing, the State orally suggested that he qualified as an HFO. In case number 06-9191, the court imposed concurrent sentences of ten years' incarceration as an HFO for the burglary and dealing in stolen property counts.FN2 In case number 06-9192, the court sentenced him to ten years' incarceration as an HFO for the burglary and grand theft counts, five years' non-HFO incarceration for the possession of cocaine count, and one year's incarceration for the misdemeanor paraphernalia count. The incarcerative terms in the second case were imposed concurrently with each other but consecutive to the concurrent terms in the first case. After hearing from the victims at the sentencing hearing about their monetary losses, the court also ordered Mr. Mapp to pay a substantial amount of restitution.
>
> Mr. Mapp's counsel filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b), claiming as sentencing

> errors the habitualization of the sentences without notice and insufficient evidence to support the amount of restitution ordered. The court struck the HFO designation from the sentences and vacated the order of restitution, but it did so well outside the permitted sixty-day time limit to make a correction in the sentencing order.

Mapp v. State, 18 So. 3d 33, 34-35 (Fla. 2d DCA 2009).

Thus, Petitioner's rule 3.800(b) motion claimed two errors: habitualizing his sentences without written notice and imposing an unsubstantiated amount of restitution. Because the circuit court granted the relief requested in the motion but beyond the sixty-day time limit, the Second District found that the motion was deemed denied and the out-of-time order striking the habitual offender designation and vacating the order of restitution was a nullity, citing rule 3.800(b)(2)(b), *O'Neill v. State,* 841 So. 2d 629 (Fla. 2d DCA 2003), and *Jackson v. State,* 793 So. 2d 117 (Fla. 2d DCA 2001).

While the Second District noted that a rule 3.800(b) motion can preserve a sentencing error for review even if the trial court does not rule on the motion in a timely manner, it held that Petitioner's rule 3.800(b) motion did not preserve the issues because they did not concern "sentencing errors" that are cognizable in such motions. *Id.* at 35-36.

> When the court habitualized Mr. Mapp's sentences, defense counsel stood mute and did not object that notice had not been received. Similarly, at the close of the

> evidence from the victims about their monetary losses, defense counsel did not object to what may have been insufficient evidence. These errors are not cognizable in a rule 3.800(b) motion because they are not "sentencing errors" as comprehended by that rule.

Id. The Second District quoted from its decision in *Griffin v. State*, 946 So. 2d 610 (Fla. 2d DCA 2007), *rev'd on other grounds*, 980 So. 2d 1035 (Fla. 2008),

> 'Sentencing error' for purposes of this motion was never intended to cover any and all issues that arise at sentencing hearings and could have been subject to objection at the hearing. The rule was not intended to circumvent rules requiring contemporaneous objections or enforcing principles of waiver. It was not intended to give a defendant a 'second bite at the apple' to contest evidentiary rulings made at sentencing to which the defendant could have objected but chose not to do so. It was not intended as a broad substitute for a postconviction claim of ineffective assistance of counsel for counsel's representation at a sentencing hearing. Instead, it was intended to address error to which the defendant had no meaningful opportunity to object and matters that rendered the sentence otherwise subject to review under rule 3.800(a).
>
> ...
>
> what is clear is that the motion was never intended to permit counsel to reopen a sentencing hearing merely to do a better job that was done at that hearing.

Id.

The Second District affirmed the habitualized sentences and order of restitution as originally imposed. *Id.* at 37.

SUMMARY OF THE ARGUMENT

Contrary to Petitioner's position, the Second District's decision in *Mapp v. State*, does not expressly and directly conflict with this Court's decision in *Jackson v. State*, 983 So. 2d 562 (Fla. 2008). In fact, the Second District quoted from and relied upon this Court's analysis in *Jackson* regarding which errors constitute "sentencing errors" for purposes of rule 3.800(b), Fla. R. Crim. P.

Consistent with *Jackson*, the Second District ruled that a claim of failure to give prior written notice of the intent to seek habitual felony offender sentencing is not a "sentencing error" cognizable by rule 3.800(b). The term "sentencing error" does not encompass any error that might occur at a sentencing hearing but rather is limited to errors in the sentence itself. Thus, Petitioner's failure to contemporaneously object at the sentencing hearing when the question of imposing a habitual sentence arose resulted in a failure to preserve the issue for appellate review.

The same analysis applies to the claim of insufficient evidence supporting the amount of restitution imposed because Petitioner had an opportunity to object at the sentencing hearing to the evidence presented but did not do so.

ARGUMENT

ISSUE I

FAILURE TO OBJECT TO THE LACK OF WRITTEN NOTICE OF INTENT TO SEEK HABITUAL FELONY OFFENDER SENTENCING WAIVED THE ISSUE FOR APPELLATE REVIEW AND THE ALLEGED ERROR WAS NOT A SENTENCING ERROR FOR PURPOSES OF RULE 3.800(B).

Contrary to Petitioner's argument, the Second District's decision in *Mapp v. State,* 18 So. 3d 33 (Fla. 2d DCA 2009), does not expressly and directly conflict with *Jackson v. State*, 983 So. 2d 562 (Fla. 2008), and in fact it follows the ruling in *Jackson* and quotes from the decision. The State continues to maintain this Court should not exercise discretionary jurisdiction in this case.

Petitioner argues the Second District interpreted *Jackson* in a more restrictive fashion than intended by this Court by concluding Petitioner's alleged error is not a sentencing error cognizable in a rule 3.800(b) motion. A review of *Mapp* dispels this claim.

The Second District utilized this Court's analysis in *Jackson* regarding which errors are "sentencing errors" cognizable in a rule 3.800(b) motion and which errors are errors in the sentencing process which must be preserved by contemporaneous objection. The Second District held based upon that analysis that Petitioner's claimed error of lack of written

notice of intent to seek habitual sentencing was an error in the sentencing process and not a sentencing error and because Petitioner failed to object to the habitual sentence when it was imposed, he failed to preserve the issue for appellate review and it was thus not cognizable in a rule 3.800(b) motion. *Mapp* is wholly consistent with *Jackson*.

In *Jackson,* this Court, in clarifying the definition of a "sentencing error" for purposes of rule 3.800, stated:

> Although quoted above, the definition of 'sentencing error' in the Court Commentary to rule 3.800 bears repeating: '[S]entencing errors include harmful errors in orders entered as a result of the sentencing process. This includes errors in orders of probation, orders of community control, cost and restitution orders, as well as errors within the sentence itself.' Fla. R. Civ. (sic) P. 3.800 court cmt. The commentary thus explains that rule 3.800(b) is intended to permit defendants to bring to the trial court's attention errors in sentence-related *orders*, not any error in the sentencing process.

Id. at 572. (emphasis in original). This Court further explained:

> rule 3.800(b) was intended to 'authorize the filing of a motion to correct *a defendant's sentence*'. . . We have never held that *any* error that happens to occur in the sentencing context constitutes a 'sentencing error' under the rule. Instead, errors we have recognized as 'sentencing errors' are those apparent in *orders* entered as a result of the sentencing process.

Id. (emphasis in original).

This Court listed examples of sentencing errors subject to rule 3.800(b) noting that they all involve errors related to the ultimate sanctions imposed, whether involving incarceration, conditions of probation, or costs. *Id.* Petitioner's confusion about *Mapp's* alleged conflict may derive from the inclusion in the list of claims a defendant was improperly habitualized. However, this Court cited *Brannon v. State*, 850 So. 2d 452 (Fla. 2003), in support of that example, and *Brannon* dealt with whether a habitual offender sentence was authorized for a particular offense and whether a habitual offender sentence may be initially imposed upon a violation of probation. *Id.* at 454.[1] *See also State v. McKnight*, 764 So. 2d 574 (Fla. 2000)(noting the habitual offender sentence imposed was expressly prohibited by statute).

Unlike Mr. Brannon, Petitioner does not deny that he committed the predicate offenses authorizing the trial court to classify him as a habitual offender.[2] He argues there was no written notice of the State's intent to sentence him as a

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[1] The Second District noted this distinction in *Mapp*. 18 So. 3d 33, 37, n.3.

[2] In fact, Petitioner said at the plea hearing that he qualified as a habitual offender (Motion To Correct Sentencing Error - Appendix D, p. 2); *Mapp,* 18 So. 2d 33, 35, n.1. Moreover, Petitioner's motion did not allege factual recitations of specific steps he would have taken to prepare any submission to the sentencing court if he had received written notice from the State. *See e.g., Judge v. State*, 596 So. 2d 73, 76 (Fla. 2d DCA 1991)(upon rehearing *en banc*).

habitual offender as required by § 775.084(3)(a)2, Fla. Stat., and noted in *Ashley v. State,* 614 So. 2d 486 (Fla. 1993), prior to entering his no contest plea. However, Petitioner had an opportunity to object to this procedural defect at the sentencing hearing when the habitual sentence was imposed and failed to do so. This is precisely the type of error in the sentencing process this Court describes in *Jackson:*

> In many circumstances, however, defendants do not have the opportunity to object or otherwise address the trial court before the sentencing order is entered. For example, where the written sentence deviates from an oral pronouncement, the defendant has no reason to object at the sentencing; only when the sentencing order issues does the defendant notice the discrepancy. . . In contrast, defendants do have the opportunity to object to many errors that occur during the sentencing process-for example, the introduction of evidence at sentencing. The rule was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the sentenc-ing process and then, if unhappy with the result, file a motion under rule 3.800(b). To the contrary, such a practice undermines the goal of addressing errors at the earliest opportunity.

983 So. 2d at 573.

This reasoning was applied by the Second District in *Mapp*. Consistent with *Jackson*, the Second District concluded that the State's failure to give Petitioner prior written notice of its intent to seek habitualization was not the type of sentencing error contemplated by rule 3.800(b), because it was not an error

in the sentencing order itself but an error in the sentencing process.

> In *Jackson*, the supreme court resolved a conflict between *Gonzalez v. State*, 838 So. 2d 1242 (Fla. 1st DCA 2003), and *Jackson v. State,* 952 So. 2d 613 (Fla. 2d DCA 2007), and decided which errors constitute "sentencing errors" for purposes of rule 3.800(b) and Florida Rule of Appellate Procedure 9.140(3). The court noted that rule 3.800(b) was not limited to the purpose of "correcting 'illegal' sentences or errors to which the defendant had no opportunity to object. Instead, the rule may be used to correct and preserve for appeal any error in an order entered as a result of the sentencing process-that is, orders related to the sanctions imposed." *Jackson,* 983 So. 2d at 574. The supreme court reiterated that "[t]he rule was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the sentencing process and then, if unhappy with the result, file a motion under rule 3.800(b)."

18 So. 3d at 37.

The Fifth District has ruled that the failure to serve a defendant with written notice of intent to habitualize the sentence prior to the entry of a plea is a procedural error and does not make the sentence illegal. *Hope v. State,* 766 So. 2d 343 (Fla. 5th DCA 2000).[3] Thus, the error could not be reviewed

[3] The Fifth District quoted from a previous ruling that, "an habitual offender sentence is illegal under the following circumstances: 1) it exceeds the enhanced statutory maximum penalty; 2) a prior qualifying offense necessary to adjudicate the defendant as an habitual offender does not actually exist; or 3) an habitual offender sentence is imposed for a felony that

under the rule allowing for the correction of illegal sentences. *Id.* at 345; *accord Judge v. State*, 596 So. 2d 73, 77 (Fla. 2d DCA 1991)(upon rehearing en banc)("[t]he notice requirement for sentencing as a habitual offender is procedural and is not an aspect of the sentence reviewable under rule 3.800(a)"); *Massey v. State*, 589 So. 2d 336 (Fla. 5th DCA 1991) *approved,* 609 So. 2d 598 (Fla. 1992)(applying a harmless error analysis to the written notice requirement).

These decisions are consistent with *Ashley v. State*, 614 So. 2d 486 (Fla. 1993), as they recognize that prior written notice is statutorily required. However, the distinguishing facts present in *Ashley,* a pre Criminal Appeal Reform Act decision, are that the lack of notice was argued on direct appeal, although not preserved by way of a contemporaneous objection, and, perhaps more problematic, Mr. Ashley was never told of the possibility or consequences of habitualization at his plea colloquy and in fact habitualization was never mentioned. Instead, the discussion at the colloquy focused on the guidelines, clearly suggesting a guidelines sentence would be forthcoming. Furthermore, Mr. Ashley's written plea which was sworn to, signed, and filed in open court during the colloquy and accepted by the judge, stated that he would be sentenced under the guidelines, receiving a term within the

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does qualify for habitual offender treatment." *Id.* at 344.

recommended range or a guidelines departure sentence capped by the standard statutory maximum of 5 years. *Id.* at 490. This Court quashed the decision of the district court, vacated Ashley's habitual offender sentence, and remanded for imposition of a sentence consistent with the terms under which his plea was proffered and accepted - a guidelines or departure sentence. *Id.* Thus, the reversal in *Ashley* was based on much more than the failure to provide written notice of intent to habitualize.

Significantly for purposes of this proceeding, *Ashley,* quoting from *Massey v. State*, 609 So. 2d 598, 600 (1992), observes that "[t]he purpose of requiring a prior written notice is to...give the defendant and the defendant's attorney an opportunity to prepare for the hearing. This is so that a knowing and intelligent plea may be entered, and in the case of sentencing, an argument against habitualization may be readied." *Id.* at 490. Written notice of intent to seek a habitual sentence is based on due process concerns to allow the preparation of a submission on behalf of the defendant. *State v. Thompson* 735 So. 2d 482, 484 (Fla. 1999)(*citing Ashley v. State*, 614 So. 2d 486 (Fla. 1993). The Second District in *Judge v. State,* supra, in concluding the notice requirement is procedural stated, "[t]he notice gives the defendant time and opportunity to submit information to convince the trial judge that the extended sentence is not necessary to protect the

public," which may factor into the court's sentencing options once it has determined a defendant qualifies as a habitual offender. 596 So. 2d at 78.

Just as a claim of denial of counsel at sentencing is an error in the sentencing process and not a sentencing error for purposes of rule 3.800(b), a claim of lack of notice of intent to seek habitualization is an error in the sentencing process and not a sentencing error for purposes of rule 3.800(b). In both circumstances, there was an opportunity to object to the procedural irregularity at sentencing and neither circumstance resulted in an illegal sentence. *Mapp* is consistent with *Jackson*. Petitioner fails to establish *Mapp* is in express and direct conflict with *Jackson.*

Last, Petitioner argues "the question is whether this Court's decision in *Jackson v. State*, 983 So. 2d 562 (Fla. 2008) has superseded" the analysis in *Vann v. State,* 970 So. 2d 878 (Fla. 2d DCA 2007) (IB 9). Petitioner is mistaken. The proceeding before this Court is an alleged conflict in *Mapp* with *Jackson*. Moreover, *Jackson* was decided after *Vann* and the *Vann* court did not review the issue under the principles established in *Jackson,* which distinguished errors in the sentencing process from sentencing errors.

ISSUE II

FAILURE TO OBJECT TO THE SUFFICIENCY OF THE EVIDENCE SUPPORTING RESTITUTION WAIVED THE ISSUE FOR APPELLATE REVIEW AND THE ALLEGED ERROR WAS NOT A SENTENCING ERROR FOR PURPOSES OF RULE 3.800(B).

As this Court noted in *Jackson,* in explaining what errors are cognizable under rule 3.800(b), it is more efficient to address the issue in the trial court first where it can be quickly remedied but that in many circumstances defendants do not have the opportunity to object or otherwise address the trial court before the sentencing order is entered. *Id.* at 573. An example would be where the written sentence deviates from the oral pronouncement and only when the sentencing order issued did the defendant notice the discrepancy. *Id.*

By contrast, defendants do have the opportunity to object to many errors that occur during the sentencing process, for example, the introduction of evidence at sentencing. *Id*. In that case, a defendant (or defense counsel) may not sit silent in the face of a procedural error and then, if unhappy with the result, file a motion under rule 3.800(b). *Id.*

Petitioner’s second claim in his rule 3.800(b) motion of insufficient evidence supporting the amount of restitution imposed, is one regarding the introduction of evidence at sentencing and thus one where he had an opportunity to object.

The Second District's holding in *Mapp* that Petitioner waived the issue by failing to object at the hearing when the amount of restitution was imposed is wholly consistent with *Jackson*.

Although Petitioner analogizes his insufficient evidence claim with those claims where court costs were imposed without statutory authority, which this Court specifically noted in *Jackson* qualifies as a sentencing error for purposes of rule 3.800(b), the analogy fails because restitution was statutorily authorized here. Petitioner does not argue to the contrary.

Petitioner had an opportunity to object at the sentencing hearing and failed to do so thus waiving the issue. As the Second District correctly ruled, it could not be resurrected by a rule 3.800(b) motion. *Accord Pilon v. State*, 20 So. 3d 992 (Fla. 4th DCA 2009); *Warren v. State*, 23 So. 3d 218 (Fla. 1st DCA 2009); *Rivera v. State,* 34 So. 3d 207 (Fla. 2d DCA 2010).

Whether the claim amounts to fundamental error was not presented to the Second District and the court did not review the claim for fundamental error. Nevertheless, several courts have determined that errors regarding the sufficiency of evidence to support a restitution award do not amount to fundamental error. *See Warren v. State,* 23 So. 3d 218, 219 (Fla. 1st DCA 2009); *Pilon v. State*, 20 So. 3d 992, 993 (Fla. 4th DCA 2009); *Rivera v. State*, 34 So. 3d 207 (Fla. 2d DCA 2010). In addition, this Court has stated, "We conclude that an

unpreserved error in the assessment of costs cannot be considered a serious, patent sentencing error that should be corrected on appeal as fundamental in the absence of proper preservation in the trial court." *Maddox v. State*, 760 So. 2d 89, 109 (Fla. 2000).

CONCLUSION

Respondent respectfully requests that this Court find that jurisdiction was improvidently granted and that the Second District's decision in *Mapp v. State* does not expressly and directly conflict with *Jackson v. State*. Alternatively, the State requests this Court affirm the holding in *Mapp*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831, this 22nd day of July 2010.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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