IN THE SUPREME COURT OF FLORIDA

TERESA SCHLABACH, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO. SC09-223 Lower Tribunal No. 4D07-2445

PETITIONER'S REPLY BRIEF

On Appeal from the District Court of Appeal
Fourth District, State of Florida

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PRELIMINARY STATEMENT

Petitioner is the defendant and Respondent is the prosecution. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this honorable Court except that Respondent may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts in her Initial Brief.

ARGUMENT

THE TRIAL COURT DID NOT LACK JURISDICTION TO MODIFY PETITIONER'S SENTENCE, AS THE COURT, IN EFFECT, ELECTED TO ENLARGE THE TIME PERIOD IN WHICH TO CONSIDER PETITIONER'S TIMELY FILED MOTION.

The Respondent raises three arguments which Petitioner contends are without merit:

1. The trial court acted in accordance with rule 3.050.

In response to Petitioner's argument that the trial court, in effect, elected to enlarge the time period in which to consider Petitioner's motion to mitigate, Respondent argues that "Rule 3.050 clearly does not allow such action". (AB5).

Petitioner contends that Florida Rule of Criminal Procedure 3.050 does not preclude the actions taken by the trial court, and that the trial court acted in accordance with the rule.

Florida Rule of Criminal Procedure 3.050 provides in pertinent part:

> [T]he court for good cause shown may, at any time, in its discretion (1) with or without notice, order the period enlarged if a request therefor is made before the expiration of the period originally prescribed or extended by a previous order or (2) upon motion made and notice after the expiration of the specified period, permit the act to be done when the failure to act was the result of excusable neglect. . . . ."

The court is permitted, sua sponte, to extend the time for considering a motion to mitigate sentence without the need for the defendant to file a motion for enlargement of time. *McCormick v. State*, 961 So.2d 1099 (Fla. 2d DCA 2007). The action of the trial court in ordering the court file for review, setting the motion on the docket for hearing and ordering that Petitioner be transported for the hearing, was, in effect, a sua sponte election to enlarge the time period in which to rule on the motion. Florida Rule of Criminal Procedure 3.050 does not preclude the court from acting sua sponte. Furthermore, in accordance with *Abreu v. State*, 660 So.2d 703 (Fla. 1995) (making rule 3.050 applicable to rule 3.800, provided the matter is resolved within a reasonable time), the court resolved the matter within a reasonable time period, entering the order to mitigate Petitioner's sentence within 45 days of the expiration of the window. (R47). Therefore, the actions of the trial court were permissible and were in accordance with rule 3.050.

2. The legal authority relied upon by Respondent is distinguishable from the facts of this case.

The Respondent cites the following five cases in its Answer Brief as legal authority for the proposition that the time requirement of Florida Rule of Criminal Procedure 3.800 is jurisdictional. These cases have facts which are distinguishable from the facts of the case before the Court:

In *State v. Hudson*, 920 So.2d 1223 (Fla. 3d DCA 2006), the trial court lacked jurisdiction to modify the sentence, however, the motion to modify was not

filed until four months after sentencing. This case is distinguishable from the instant case, as Petitioner's motion was timely filed. In *Bowling v. State*, 688 So.2d 947 (Fla. 5th DCA 1997), the court was without jurisdiction to increase the terms of defendant's probation by adding 39 weekends in jail, where the court entered the order six months after the violation of probation hearing. The facts of *Bowling* are not on point with the case before this Court. In *Gafford v. State*, 873 So.2d 1191 (Fla. 1st DCA 2001), the defendant appealed a sentence which exceeded the terms of the plea agreement by filing a motion to correct sentencing error six months after sentencing. The court held that under the 1997 amendment to rule 3.800(b), a sentence that exceeds a plea agreement is no longer considered a sentencing error, but, instead, is deemed to be a violation of the plea agreement which must be challenged under Florida Rule of Criminal Procedure 3.170(l), within 30 days. Unlike the case at bar, the defendant's motion in *Gafford* was both untimely and defective. In *Knapp v. State*, 741 So.2d 1150 (Fla. 2d DCA 1999), the court lacked jurisdiction to modify defendant's sentence, however, unlike the case before this Court, the *Knapp* court was divested of jurisdiction when a notice of appeal was filed. The facts of *Evans v. State*, 229 So.2d 261 (Fla. 1969), are also not on point with the issue before this Court. In *Evans*, defendant's timely filed motion to mitigate was not ruled on by the court for almost three years.

This Court denied the petition for writ of certiorari, holding that the motion to mitigate was an improper attempt to secure judicial parole. (AB5).

Citing *Evans*, in which the trial court took almost three years to rule on defendant's motion, Respondent argues that "if the time period were not jurisdictional, the trial court could rule on the motion at any time" (AB5). Respondent's argument belies this Court's holding in *Abreu*, *supra*:

> The Florida Rules of Criminal Procedure are designed to promote justice and equity while also allowing for the efficient operation of the judicial system. We see no reason why the provision of rule 3.050 should not be applied to rule 3.800. **We hold that the sixty day period in rule 3.800(b) may be extended pursuant to rule 3.050, providing the matter is resolved within a reasonable time.** (Emphasis added.)

3. Federal courts have held that the time limitations of similar rules are not jurisdictional.

Lastly, citing *United States v. Addonizio*, 442 U.S. 178 (1979), Respondent "disagrees" with Petitioner's argument that federal courts have held that the time limitations of similar rules are not jurisdictional. (AB5-6).

Respondent's argument is without merit. The year following *Addonizio*, the United States Court of Appeals, in *United States v. Johnson*, 634 F.2d 94 (3d Cir. 1980), held that the district court did have jurisdiction to entertain a timely filed motion for reduction of sentence, where the trial court did not rule on the motion

until four months after the expiration of the 120 day time period. In footnote 1, the court stated:

> Johnson's motion was not filed until April 25, 1980, exactly 120 days after the December 27 hearing, and the district court did not rule on the motion until April 28. **It is well established, however, that if a Rule 35 motion is filed within 120 days of sentencing, the court retains jurisdiction for a reasonable time after the expiration of 120 days to decide the motion**. See *Government of the Virgin Islands v. Gereau*, 603 F.2d 438,442 n.2 (3d Cir. 1979); *United States v. Mendoza*, 581 F.2d 89 (5th Cir. 1978) (en banc); *United States v. Janiec*, 505 F.2d 983, 985 n.3, 986 (3d Cir. 1974), cert denied, 420 U.S. 948, 95 S.Ct. 1331, 43 L.Ed2d 427 (1975); 2 C. Wright, Federal Practice and Procedure (Criminal) s 587, at 573 (1969). (Emphasis added).

Furthermore, as the court discussed in *Grosse v. State*, 511 So.2d 688 (Fla. 4th DCA 1987):

> Federal Rule of Criminal Procedure 35(b) provides that a motion to reduce sentence may be made within 120 days after imposition of the sentence, and that the court shall determine the motion within a reasonable time . . . . **[T]he rule was amended in 1985 to clarify that as long as defendant's motion is filed within the time limit, the court has a reasonable time to make a determination.**
> (Emphasis added).

CONCLUSION

Based on the legal authority and arguments set forth in Petitioner's Initial and Reply Briefs, Petitioner respectfully requests that this Court quash the decision of the Fourth District Court of Appeals, and remand with instructions to reinstate the trial court's order mitigating Petitioner's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Reply Brief has been furnished to: JAMES J. CARNEY, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by U.S. Mail this _____ day of August, 2009.

_____
Counsel for Petitioner

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared in compliance with the font standards required by *Florida R. App. P.* 9.210. The font is Time New Roman, 14 point.

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