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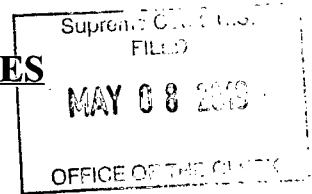
IN THE
SUPREME COURT OF THE UNITED STATES

Melvin Perez-Petitioner

vs.

Mark S. Inch, Secretary, Florida

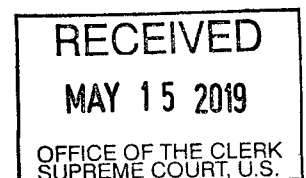
Department of Corrections-RESPONDENT



**ON PETITION FOR WRIT OF CERTIORARI TO
THE FIFTH DISTRICT OF APPEALS OF FLORIDA**

PETITION FOR WRIT OF CERTIORARI

Melvin Perez DC# X11781
Mayo Correctional Inst Annex
8784 W US 27
Mayo Florida 32066





QUESTION PRESENTED

-Can a trial court score an offense as a prior on a sentencing scoresheet if the time of the commission of that offense is subsequent to the time of the primary offense being sentenced?

-Can a trial court score an offense as a prior on a sentencing scoresheet and use that same prior offense to upward depart from the sentencing range points?

-If there is an ambiguity in determining the date of the prior offense, because there are documents that show five different dates, does the court have to resolve the matter in favor of the accused?

-Do the ends of justice require a Court to correct an improper calculation made in a sentencing scoresheet when the error will result in significant sentence changes?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION OF WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the
judgment below.

OPINIONS BELOW

☒ For cases from the state courts:

The opinion of the highest state court to review the merits appears at
Appendix A to the petition and is

☒ is unpublished.

The opinion of the trial court appears at Appendix B to the petition and is

☒ is unpublished.

JURISDICTION

☒ For the cases from state courts:

The date on which the highest state court decided my case was February 12, 2019. A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: March 21, 2019, and a copy of the order denying rehearing appears at appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5

....nor be deprived of life, liberty, or property, without due process of law....

Amendment 14

....nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Initially, on April 27, 2018, Tonya D. Cromartie, Esquire, filed a 3.800(a) in the Circuit Court for the Ninth Judicial Circuit, Osceola County Florida.

In the motion, Petitioner raised two grounds: 1) The murder charge was improperly scored as a prior offense on the sentencing guidelines scoresheet for the robbery charge and 2) The Court impermissibly took into account the Defendant's lack of remorse during sentencing. On July 5, 2018, the trial court denied the motion without ordering the State to respond.

On claim one, the trial court held that the allegation of an irregularity in the date of the murder offense would require an evidentiary determination, which is not cognizable under Rule 3.800(a). Furthermore, that the cases relied upon were distinguishable, because all involved direct appeals rather than correction under Rule 3.800(a)

On ground two, the trial court held that, as in Ground 1, this court finds that the Defendant's sentences are not illegal as a matter of law, and again, the cases on which he relies all involved direct appeals.

Counsel appealed the denial to the Fifth District Court of Appeal. The State did not respond. The District Court denied the appeal. Petitioner *pro se* filed for rehearing and rehearing en banc. The District Court denied said motion on March 21, 2019.

REASONS FOR GRANTING THE PETITION

Florida Rules of Criminal Procedure 3.800 states in pertinent part as follows:

(a) Correction.

(1) Generally. A Court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief, provided that a party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b) (1) or during the pendency of a direct appeal.

In the Petitioner's Motion, he asserted that offense date of the Murder contained within the charging Affidavit, Information, Amended Information, and Sentencing Guidelines Scoresheet all vary in the offense date and are collectively ambiguous as to the offense date of the Murder charge. (See Appendix "D")

It is well settled Florida law that the rule of law in all criminal cases is that any ambiguity in statutes, rules, verdicts, judgments, sentences, and any other matter is resolved in favor of the accused. *Williams v. State*, 528 So. 2d 453, 454 (Fla. 5th DCA 1988).

In Section 775.021(1), Florida Statutes, the Florida Legislature codified the rule of lenity.

Also, in accordance with *Gore v. State*, 552 So. 2d 1185, 1186 (Fla. 5th DCA 1989), the court is not permitted to score an offense as a prior on a sentencing

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scoresheet if the time of the commission of that offense is subsequent to the time of the primary offense being sentenced.

In this case, the issue of whether the murder charge occurred prior to the robbery charge is ambiguous and that ambiguity should be construed in the light most favorable to the accused. The trial court summarily dismissed this issue because it would require an evidentiary determination that isn't cognizable pursuant to Rule 3.800(a). It wouldn't.

Per Rule 3.800(a)(1), "A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief...."

In a similar matter, under Rule 3.850, a court can hear an illegal sentence. Therefore, it could have treated the Rule 3.800 motion as a Rule 3.850 motion.

The Fifth District Court decision is in direct conflict with *Atwood v. State*, 765 So. 2d 242, 243 (Fla. 1st DCA 2000), where the First District Court of Appeal concluded that, "... scoresheet-based sentencing errors under Rule 3.800(a) need to be capable of resolution by reference to "the record," this refers to the entire written record available in the circuit court, not just to the limited record on appeal."

There is no question that the Petitioner alleged that the court records, i.e. Charging Affidavits, Informations, and Scoresheets, differ as to the offense date of the murder charge and create an ambiguity.

Even a response from the State Attorney in Petitioner's 3.850 proceeding show that the robbery took place before the murder; therefore, the murder cannot be used as a prior as it took place after the robbery, not before.

There is no doubt that due to the trial court scoring the murder as a prior as to the robbery charge, it caused the Scoresheet to be improperly calculated and for the Petitioner to be illegally sentenced.

In the sentencing guidelines scoresheet for the robbery charge, the murder charge was scored as a prior. The Judge found the sole reason for an upward departure to be that the "Primary offense is scored at a level 7 or higher and the defendant has been convicted of one or more offense that scored, or would have scored, at an offense level of 8 or higher."

At the time of sentencing, the Court scored the murder charge as the sole prior that qualified for that upward departure. As a result, the Petitioner scored 121 total sentence points. He scored 93 state prison months. The Judge could've decreased his sentence 25% to 69.75 months or increase it 25% to 116.25 months.

Had the murder charge not been scored as a prior the trial court could not have upward departed and sentenced the Petitioner to a total of 15 years. Additionally, the Petitioner would have only scored 92 total sentence points. Since he would have exceeded 52 total sentence points, a state prison sentence would have still been mandatory. However, his total sentence points and permissible range would have been much lower. His total sentence points would have been 92, minus 28 is 64, his state prison months.

Per the Guidelines, the Court could have decreased his state prison months by 25% (48 months) or increased his state prison months by 25% (80 months).

This case is factually similar to *Gilbert v. State*, 680 So. 2d 1132 (Fla. 3rd DCA 1996).

In *Gilbert*, the Court sentenced the Defendant to four consecutive thirty-year and six concurrent fifteen-year terms for sexual offences against his daughter. *Id.* at 1132. The offences were alleged to have occurred on unspecified dates between December 13, 1993 and March 24, 1994. *Id.* The 1994 sentencing guidelines only applied to offences committed on or after January 1, 1994. Those guidelines yielded a permissible range of 23 to 38.5 years imprisonment. *Id.*

The Court concluded that it was impossible to determine from the information or the evidence whether the crimes were committed before or after

January 1, 1994. Id. Because finding the crimes occurred after January 1, 1994 would result in a lesser sentence to the Defendant, the rule of lenity requires the Court to resolve the ambiguity in favor of the Defendant. Id. at 1133. See also *State v. Griffith*, 675 So. 2d 911 (Fla. 1996) (uncertainty as to the date of offenses resolved in favor of being committed before defendant reached sixteen and thus subject to lesser penalties).

Therefore, it is incumbent on this Court to remand this case to trial court for the trial court to consider the Motion on its merits and to resentence the Petitioner in accordance with the corrected scoresheet.

CONCLUSION

The petition for the Writ of Certiorari should be granted.

Respectfully Submitted



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Date: 5 - 8 - 2019