

APPENDIX A

6TH DCA ORDER DENYING APPELLANT'S MOTION AND AMENDED MOTION FOR REHEARING,
REHEARING EN BANC, CERTIFICATION, AND WRITTEN OPINION

DATE: 7/31/2024

PAGES: 8-9

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT**

July 31, 2024

HARRY LEE GOLDSBORO, II,
APPELLANT(S),

CASE NO.: 6D2023-2883
L.T. NO.: 2018-CF-004010-A-O

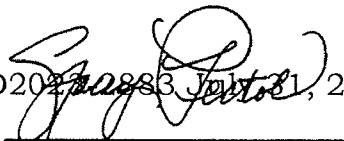
V.

STATE OF FLORIDA,
APPELLEE(S).

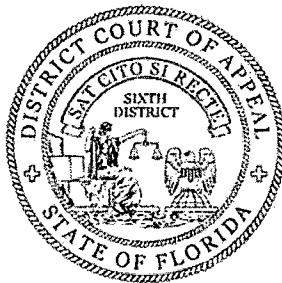
BY ORDER OF THE COURT:

Appellant's motion and amended motion for rehearing, certification, written opinion, and rehearing en banc are denied.

I hereby certify that the foregoing is a true copy of the original court order.

6D2023-2883 July 31, 2024


Stacey Pectol
Clerk



PANEL: TRAVER, C.J., and NARDELLA and WOZNIAK, JJ. (acting on panel-directed motion(s))

EN BANC COURT (acting on en banc motion)

cc:

DAYTONA ATTORNEY GENERAL
DAYTONA OFFICE OF THE
ATTORNEY GENERAL

HARRY LEE GOLDSBORO II
TIFFANY RUSSELL, CLERK

APPENDIX A

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
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HARRY LEE GOLDSBORO, II,
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CASE NO.: 6D2023-2883
L.T. NO.: 2018-CF-004010-A-O

V.

STATE OF FLORIDA,
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BY ORDER OF THE COURT:

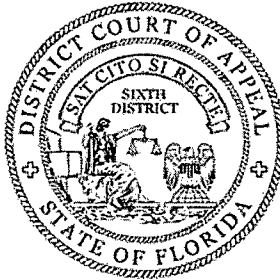
Appellant's Amended Motion for Rehearing, Rehearing En Banc, Certification and Written Opinion filed July 10, 2024, is denied. Appellant's Motion for Rehearing and Request for a Written Opinion filed June 28, 2024, is denied as moot.

I hereby certify that the foregoing is a true copy of the original court order.

6D2023-2883, July 31, 2024



Stacey Pectol
Clerk



PANEL: TRAVER, C.J., and NARDELLA and WOZNIAK, JJ.

cc:

DAYTONA ATTORNEY GENERAL
DAYTONA OFFICE OF THE
ATTORNEY GENERAL

HARRY LEE GOLDSBORO II
TIFFANY RUSSELL, CLERK

APPENDIX B

AMENDED MOTION FOR REHEARING, REHEARING EN BANC, CERTIFICATION, AND WRITTEN
OPINION

DATE: 6/21/2024

PAGES: 10-13

HARRY LEE GOLDSBORO II,
APPELLANT

SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO: 6023-2883
LOWER TRIBUNAL No.:
2018-CF-004010-A-0
DATE: 21 JUNE 2024

V.
STATE OF FLORIDA,
APPELLEE

AMENDED MOTION FOR REHEARING, REHEARING EN BANC,

APPENDIX B CERTIFICATION, AND WRITTEN OPINION

COMES NOW, on this 21st day of June 2024, the Petitioner, HARRY LEE GOLDSBORO II, pro se, submits this timely Amended Motion For Rehearing, Rehearing En Banc, Certification, and Written Opinion in case no.: 6023-2883 from the Sixth District Court of Appeal's Per Curiam AFFIRMANCE OF the Lower Tribunal's Order Denying the Petitioner's 3.850 Postconviction Motion Filed in the 6th DCA on March 28, 2024. The 6th DCA denied the Petitioner's appeal on June 11, 2024 and the Petitioner received a copy of the order via mail on June 19th, 2024. The Petitioner then immediately Filed a Motion For Rehearing and Request For a Written Opinion on June 19th, 2024. However, the Petitioner's original motion, although timely Filed, did not comply with the requirements established in F.R. App. P. Rule 9.330 and 9.331. This amended motion attempts to rectify those errors.

MOTION FOR REHEARING AND REHEARING EN BANC

The Petitioner asserts that the court overlooked or misapprehended in its order the following issues:

1. A manifest injustice occurred when the defendant accepted a plea without the court or his attorney explaining that pleading to the technical violation of probation only could result in a maximum five-year prison sanction, which renders the plea involuntary.
2. Whether the court failed to and counsel was ineffective for failing to inform the defendant of his right to withdraw his plea prior to sentencing in accordance with F.R. Crim. P. Rule # 3.170 after the new charge was dismissed.
3. Whether a plea to a technical violation of probation can result in a revocation of probation and a maximum five-year sanction when a technical violation is not a substantial and willful violation.
4. Whether the court and counsel failed to follow F.R. Crim. P. Rule # 3.170(j) Time and Circumstances of Plea, when the court and counsel failed to provide the defendant with a reasonable amount of time to consider the plea.
5. Whether the court and counsel failed to introduce FL ST. 94B.06 as the authority for technical violations of probation sanctions and violated the law and the defendant's right to due process when it sentenced the defendant to an unauthorized five-year prison sentence.

The Petitioner is requesting a rehearing en banc as the Petitioner's first issue is of great importance because the defendant's signing of an involuntary plea based on the court's and counsel's failure to explain that a first-time technical violation could expose him to a five-year prison sentence, resulted in a manifest injustice. In addition, such consideration is necessary to maintain uniformity in the court's decisions.

In *Ben v. State*, 6023-786 Fla. App. Apr. 05, 2024, the Sixth District Court of Appeals found that only a willful and substantial violation of

probation can support a revocation of probation and negligence or ineptitude does not support a finding of a willful and substantial violation.

(Bean v. State, 2024). The Sixth DCA also Found that there was no competent substantial evidence to support the trial court's finding that defendant willfully and substantially violated his probation (Cruz v. State, 6D23-919 Fla. App. Mar 01, 2024; Marcus v. State, 376 So. 3d 117 Fla. App. 2022; Watkins v. State, 5D2023-3374 Fla. App. Jun 07, 2024. Finding that the trial court must grant an evidentiary hearing unless the allegations are not pled with sufficient detail, are conclusively refuted by the record, or are legally insufficient. Appellant argued that his plea was involuntary because he was never informed that if he violated probation, he could be sentenced to the statutory maximum for the crime.). As a result of these rulings from the 6th DCA, and the court rulings referenced in the Petitioner's previous motions, I express a belief, based on reasoned and studied judgment, that the case or issue is of exceptional importance and I express a belief, based on a reasoned and studied judgment, that the panel decision is contrary to the decisions of this court in Bean v. State, 2024 and Cruz v. State, 2024 and that a consideration by the Full Court is necessary to maintain uniformity of decisions in this court.

MOTION FOR CERTIFICATION

The Per Curiam Affirmance of the lower tribunal's order denying all claims submitted in the Petitioner's 3,850 Post conviction Motion, which was affirmed without an opinion, fails to address the issue of whether a technical violation of probation can result in a revocation of probation and subsequent maximum five year prison sentence. The court's affirmance without addressing this issue conflicts with the district court opinions in: Hugan v. State, 190 So.3d 210 Fla. App. 2016; Garcia v. State, 701 So.2d 607 Fla. 2d DCA 1997; Molina v. State, 520 So.2d 320 Fla. 2d DCA 1988 - "[the 2nd DCA] has refused to find technical violations sufficient to justify revocation"; Copeland v. State, 864 So.2d 1197 Fla. 1st DCA 2004; Faulstich v. State, 5th DCA Fla. 2022; Knight v. State, 187 So.3d 307 Fla. 5th DCA 2016; Limbaugh v. State, 16 So.3d 954 Fla. 5th DCA 2004; Laing v. State, 200 So.3d 166 Fla. 5th DCA 2016; Mangini v. State, 302 So.3d 1058 Fla. 5th DCA 2020; Niemi v. State, 284 So.3d 1143 Fla. 5th DCA 2019; and Rousay v. State, 226 So.3d 1015 Fla. App. 2017.

The Petitioner humbly and respectfully requests that this Honorable Court of Appeals certifies the following questions of great public importance:

1. Does a manifest injustice occur when a defendant accepts a plea to a technical violation of probation without the court or counsel explaining that the plea could result in a maximum five year prison sentence, which renders the plea involuntary?
2. Is a technical violation of probation a willful and substantial violation sufficient to justify a revocation of probation?

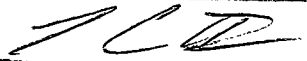
REQUEST FOR A WRITTEN OPINION

The Petitioner believes that a written opinion would provide: (i.) a legitimate basis for supreme court review; (ii) an explanation for an apparent deviation from prior precedent; and (iii) guidance to the parties and lower tribunal when: a. the issue decided is also present in other cases pending before the court or another DCA (Goldsboro v. State, 6024-0751); b. the issue decided is expected to recur in future cases; and c. there are conflicting decisions on the issue from lower tribunals.

WHEREFORE the Petitioner prays that this Honorable Court of Appeals grants the rehearing, or hearing en banc, certification of both questions of great public importance, and provides a written opinion to establish a legitimate basis for Florida Supreme Court review.

OATH

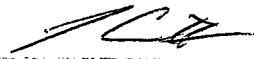
Under penalties of perjury, I declare that I have read the foregoing motion, or had it read to me, that I understand the motion's content, and that all of the facts alleged in the motion are true and correct.


HARRY LEE GOLDSBORO II

APPELLANT, PRO SE
BJ0111 / JAIL #4838407

CERTIFICATIONS AND ACKNOWLEDGEMENT

I certify that the motion is filed in good faith, that I have a reasonable belief that the motion is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court. I certify that I understand English and have read the foregoing motion or had it read to me. I understand that I am subject to judicial or administrative sanctions, including but not limited to forfeiture of gain time, if this motion is found to be frivolous, malicious, made in bad faith or with reckless disregard for the truth, or an abuse of the legal process.


HARRY LEE GOLDSBORO II

APPELLANT, PRO SE
BJ0111 / JAIL #4838407

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the 6th DCA Clerk of Courts 811 East Main Street Lakeland, Florida 33801, and the State of Florida at the Office of the Attorney General 444 Seabreeze Blvd 5th Floor Daytona Beach, FL 32118, and the Brevard County Clerk of Court for the 18th Judicial Circuit 2725 Judge Fran Jamieson Way, Viera, FL 32940-8006. Delivered by mail on this 22nd day of June 2024.


HARRY LEE COLINDOR, JR.

APPELLANT, PRO SE
B30111/JAZL #4838407

BREVARD COUNTY JAIL COMPLEX
ATTN: LEGAL MAIL

860 CAMP ROAD

COCOA, FL 32927

02 JUNE 2024

APPENDIX C

6TH DCA ORDER DENYING APPELLANT'S APPEAL OF LOWER TRIBUNAL'S ORDER
DENYING 3.800 POSTCONVICTION MOTION

DATE: 6/11/2024

PAGES: 14-

**SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

Case No. 6D23-2883
Lower Tribunal No. 2018-CF-004010-A-O

HARRY LEE GOLDSBORO, II,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal pursuant to Fla. R. App. R. 9.141(b)(2) from the Circuit Court for Orange County.
Luis F. Calderon, Judge.

June 11, 2024

PER CURIAM.

AFFIRMED.

TRAVER, C.J., and NARDELLA and WOZNIAK, JJ., concur.

Harry Lee Goldsboro, II, Cocoa, pro se.

No Appearance for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING
AND DISPOSITION THEREOF IF TIMELY FILED

APPENDIX D

NOTICE OF INQUIRY (PERSONAL COPY FOR RECORDS NOT FILED)

DATE: 1/25/2024

PAGES: 15-16

HARRY LEE WOODBORD II
Appellant/Petitioner
v.
STATE OF FLORIDA
Officer / Respondent

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA SIXTH DISTRICT
(Personal Copy For Records)
NOT ORIGINAL

CASE NO.: 6D23-2883
L.T. No.: 2018-CF-004010-A-0

NOTICE OF INQUIRY

COMES NOW, the appellant, HARRY LEE WOODBORD II, pro se, submits this Notice of Inquiry to the 6th DCA on January 15th 2024 to find out the status of case no. 6D23-2883 Filed on June 27th 2023 from the 9th Judicial Circuit Clerk of Courts. On June 9th, 2023 the appellant Filed three Emergency Appeals of Orders denying the appellant's pro se 3,850s and 3,800 cost-conviction motions to the 5th DCA. The appellant had not yet received the record and the appeal was transferred to the 6th DCA, who mailed a notice to the appellant on June 21st 2023 instructing him that the court required the record to determine jurisdiction and a \$1300.00 Filing Fee was required (Case No.: 6D23-2876). On June 27th 2023, the Orange County Clerk of Courts sent the Final record after receiving the appellant's Application for Criminal Indigent Status, and the case was assigned as 6D23-2883. The appellant Files this Notice of Inquiry to determine the status of the case.

Harry Lee Woodbord II

1. Name
2. Appellant, Pro Se
3. DC / Jail #
4. SMART COMP
5. P.O. BOX
6. SEMINOLE
7. 25 JAN 2024

OATH

CERT AND ACK

CERT OF SERVICE

To 6th DCA and 9th Clerk of Courts

APPENDIX E

EMERGENCY APPEAL OF ORDER DENYING DEFENDANT'S MOTION TO CORRECT
ILLEGAL SENTENCE TO THE 5TH DCA

DATE: 5/24/2023

PAGES: 17-26

EMERGENCY

APPEAL OF ORDER DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE TO THE FIFTH DISTRICT COURT OF APPEALS

COMES NOW, on this 9th day of June 2023, the defendant/appellant, HARRY LEE GOLDSBORO II, pro se, submits this timely emergency Appeal of Order Denying Defendant's Motion to Correct Illegal Sentence. Following the circuit court's denial without prejudice of defendant's pro se "3.800 Motion to Correct an Illegal Sentence" filed on May 24, 2021. The circuit court filed order on May 24, 2023 denying the defendant's motion finding that the defendant's reliance on FL ST 948.06 was misplaced challenge of the conviction on condition three is not a recognizable claim for a 3.800(a) motion, his claim of violations of ST 948.06(1)(h)1-7 (2018) and 948.06(9) (2019) does not apply to him, and he was not illegally sentenced for receiving a statutory maximum five year prison sentence for a technical violation of probation. In rebuttal, the defendant claims in this appeal that section 948.06(2)(g) mandates that if the court dismisses an affidavit alleging a violation of probation, the offender's probation shall continue as previously imposed. This clearly means that when the new law was dismissed, the technical ~~violation~~ violation was not a substantial violation that could lead to revoking probation, and his probation should have been reinstated, or terminated since he spent over 7 months incarcerated. The defendant asserts and the trial court acknowledges in its procedural history section that the defendant filed a 3.800 motion while his direct appeal was still pending, which means he filed a 3.800(b) motion and is entitled to an evidentiary hearing. The defendant's claims of violations of FL ST 948.06 and his comparison between 948.06 (2018) and (2019) was to demonstrate that the sanctions were not drastically altered to permit prison sentences for a single technical violation because they are not considered substantial violations of probation. The defendant received an illegal sentence because FL ST 948.06 (2018) does not authorize a prison sentence, especially a maximum sentence, for a technical violation of probation.

The defendant/appellant is requesting consideration for an emergency review and expedited ruling because the defendant successfully completed his prison sentence on May 12th, 2023, and said sentence was the direct result of the conviction from which the defendant is seeking relief. In addition, the defendant argues in a separate 3.850 motion that his counsel misled and misinformed him of the consequences of signing the original plea. One such consequence is that the state filed a petition seeking civil commitment as a sexually violent predator under the Jimmy Ryce Act based on the underlying conviction of which the defendant sought relief from by filing his 3.850 Motion for Postconviction Relief in May and June 2021. The state is basing its civil commitment petition on this sole conviction of which the defendant's counsel affirmatively explained "you don't have to worry about that, it doesn't apply to you," when he asked about the JRA clause during the plea colloquy. The trial for the civil commitment is currently scheduled for July 18th, 2023.

Therefore, the defendant respectfully requests that this honorable court consider this appeal an emergency and expedite a ruling since the defendant's prison sentence has ended and prior to a civil commitment trial commencing. The defendant is currently incarcerated in the Brevard County Jail awaiting the 5th DCA's ruling on a writ of prohibition following the state's order to show cause on defendant's motion to dismiss a case from 2018 based on a violation of constitutional speedy trial. The defendant is seeking for the 5th DCA to reverse the order denying the defendant's 3.800 motion and remand the case for an evidentiary hearing to give him the opportunity to present evidence supporting his claims in accordance with the procedures proscribed in rule 3.800(b). Alternatively, the court could treat the defendant's 3.800 motion as a timely filed 3.850 motion as it already meets the procedural requirements for that motion in accordance with the 2nd District in *Davis v. State* 154 So.3d 1203 Fla. App. 2015, *Franklin v. State* 31 So.3d 948 Fla. App. 2010, and *Houghtaling v. State* 620 So.2d 1019 Fla. App. 1996.

As a third alternative, since the defendant is challenging the legality of the sentence and not the conviction, his 3.800 motion meets the criteria of a 3.800(a) motion, since it can be raised at any time and the merits of his claims are not refuted by the record, and he has followed all of the proper appellate procedures. In *Hugan v. State* 190 So.3d 210 Fla. App. 2016, the 2nd DCA ruled that the state failed to prove that Hugan's technical violation was substantial and willful, and the trial court's revocation of his community control was an abuse of discretion since Hugan's conduct was only inept and negligent and did not amount to a willful or deliberate violation. The 2nd DCA found that Hugan's failure to contact his community control officer about working an extra shift was at worst due to his own negligence and "a violation of probation will not be found where the violation is due to negligence or ineptitude." (quoting *Garcia v. State* 701 So.2d 607 Fla. 2d DCA 1997). Because Hugan fully served his sentence, the appellate court decided to decline to dismiss the appeal as moot since there may have been significant collateral consequences stemming from the unlawful revocation of his community control and adjudication of guilt. The 2nd DCA declared that "This court has refused to find technical violations sufficient to justify revocation." (*Molina v. State* 520 So.2d 320 Fla. 2d DCA 1988). As such, the 2nd DCA remanded the trial court to vacate Hugan's sentence and reinstate but immediately terminate his probation; the defendant seeks the same relief in the instant case.

The circuit court provided a procedural history that showed the defendant filed a timely motion to withdraw plea, a direct appeal based on an illegal sentence, fundamental error, and an abuse of discretion, then he filed a 3.800(b) since his direct appeal was still pending. The circuit court first cites *Plott v. State* 148 So.3d 90 Fla. 2014 which states that "An illegal sentence is undefined in rule 3.800," but the Florida Supreme Court defines it as "one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and

s could impose under any set of factual circumstances." (Citing *Williams v. State* 957 So.2d 600 Fla. 2018) *Plott v. State* also references *State v. Mancino* 714 So.2d 429 Fla. 1998 which defines an illegal sentence as "a sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal." The court of appeals cleared Plott's claims of an illegal sentence because his case concerned an upward departure that exceeded the statutory maximum. The circuit court then cited *Johnson v. State* 60 So.3d 1045 Fla. 2011 which found that "A defendant bears the burden to show clear entitlement based on the face of the record,"; however, *Johnson v. State* involved the appellant seeking credit for time served under rule 3.800 for prior plea agreements which the Florida Supreme Court found are not cognizable under the rule, and this case is also irrelevant to the defendant's 3.800 motion. The circuit court also relies on *Brooks v. State* 969 So.2d 238 Fla. 2007 stating that "Under rule 3.800(a) no evidentiary hearing is allowed," but Brooks's case involved a sentencing error related to using an incorrect worksheet, which would require evidence to be reviewed since the error would not be clear based on the face of the record, which is prohibited by a rule 3.800(a) motion. In *State v. Anderson* 905 So.2d 111 Fla. 2005 the Florida Supreme Court explained that a defendant has several options for raising a sentencing error: First, when preserved for review, the error may be raised on direct appeal; second, even if not preserved 3.800(b) allows defendants to file a motion to correct sentencing errors even while an appeal is pending; third, the rule also entitled a defendant to an evidentiary hearing (*Maddox v. State* 760 So.2d 89 Fla. 2000); third, a defendant may raise a sentencing error under a rule 3.850 motion; and fourth, a defendant may file a 3.800(a) motion at any time, based on a claim of a sentencing error that is demonstrated on the face of the record since an evidentiary hearing is not allowed. The defendant argues that he filed a 3.800(b) since his appeal was still pending and is therefore entitled to an evidentiary hearing; however, his newly 3.800 motion also meets the requirements of a 3.800(a) motion and his claim that a prison sanction following a probation revocation for a technical violation was an illegal and unlawful sentence satisfies the requirements for a 3.800(a) motion and the evidence is clear from the record.

The circuit court's reliance on *Stambough v. State* 891 So.2d 1136 Fla. 4th DCA 2005 is also erroneous in rebutting the defendant's claims of violations of FL 57.948.06, because the 4th DCA's ruling essentially validates the defendant's claim that his probation would have been reinstated after the dismissal of the new law violation and all tolled time should have been credited with reinstatement of probation. FL 57.948.06(2)(g) provides that if the court dismisses a VOP affidavit, the offender's probation "shall continue as previously imposed, and the offender shall receive credit for all tolled time against his or her term of probation." The statute thus nullifies the tolling mechanism when a court finds that a defendant did not violate his probation.

19

The same result shall occur when the state dismisses or withdraws a VOP charge, even though the court has not formally dismissed the affidavit. Otherwise, the state would be able to avoid the effect of a court dismissal by acting on its own. Once the state dismissed the VOP charge, the original DVJ probation continued as previously imposed, with Stambaugh receiving credit for all tolled time.

Last, the circuit court cites Coughlin v. State 932 So.2d 1224 Fla. 2d DCA 2006, Plowman v. State 586 So.2d 454 Fla. 2d DCA 1991, State v. Spella 567 So.2d 1051 Fla. 5th DCA 1990, Henry v. State 920 So.2d 1204 Fla. 4th DCA 2006, Salazar v. State 675 So.2d Fla. 3d DCA 1996, and Ferenc v. State 563 So.2d 707 Fla. 1st DCA 1990 as case law justifying its finding that the defendant's challenge of the conviction on condition three is not a cognizable claim for a 3.800 motion, and allowing the defendant to attack his conviction would infringe upon rule 3.850. Once again, these cases are irrelevant to the defendant's case and claims and are not justifiable or applicable to denying relief for the reasons provided by the court. Coughlin, Plowman, Spella, Henry, Salazar and Ferenc are all cases in which the defendants made double jeopardy claims under rule 3.800(a) and attacked their convictions rather than their sentences, which is not a claim the defendant raised in his motion. The defendant referenced FL ST. 948.06 (2018) and (2019) to show that neither version authorizes, permits, or sanctions any prison term or revocation of probation for a technical violation since it is not ^{equitable} to a substantial violation and thus any prison sentence resulting from a technical violation is unsanctioned, unlawful, and thereby illegal. The defendant could not receive a five-year statutory maximum prison sentence for a violation of condition three of his probation because it was not a substantial violation that could result in the revocation of his probation and violate counts two and three of the underlying charge.

"A violation that causes a revocation of probation must be both willful and substantial," (Copeland v. State 864 So.2d 11 Fla. 1st DCA 2004). In Faulstich v. State 5th DCA Fla. 2022, the 5th DCA reversed and remanded the case to the trial court finding that at a violation of probation hearing, the state has the burden to prove by a preponderance of the evidence that the defendant violated a condition of probation willfully and substantially. (Citing Knight v. State 187 So.3d 307 Fla. 5th DCA 2016, and Limbaugh v. State 16 So.3d 954 Fla. 5th DCA 2004) "A trial court's determination that a probationer willfully and substantially violated a term or condition of probation must be supported by competent, substantial evidence." A probation revocation cannot be based solely on hearsay (Laing v. State 200 So.3d 166 Fla. 5th DCA 2016); in Mangini v. State 302 So.3d 1058 Fla. 5th DCA 2020, the 5th DCA reversed and remanded for the court to vacate the judgment and sentence and restore Mangini's original probation after finding that the trial court abused its discretion in finding that Mangini willfully and substantially violated probation; in Nieminen v. State 289

3d 1143 Fla. 5th DCA 2019, the 5th DCA found that appellant did not willfully and substantially violate two conditions of probation claiming that where it is unclear from the record whether the court could have revoked probation and imposed the same sentence based on missing violations, the appellate court must reverse and remand for determination whether properly-substantiated violations warrant a revocation of probation; *Hugan v. State* 190 So.3d 210 Fla. App. 2016, *Garcia v. State* 701 So.2d 607 Fla. 2d DCA 1997, *Idle v. State* 755 So.2d 771 Fla. 4th DCA 2000, and *Stevens v. State* 599 So.2d 254 Fla. 3d DCA 1992 all find that inept and negligent conduct do not amount to a willful or deliberate violation of probation. Failure to attend required program absent a showing that failure was a product of a knowing and willful act and not negligence or ineptitude could not support a probation revocation (*Buckins v. State* 789 So.2d 1184 Fla. 4th DCA 2001); inept/negligent failure to return to halfway house because of car trouble was not willful violation (*Thomas v. State* 672 So.2d 587 Fla. 4th DCA 1992); missing meeting of sex offender program does not support conclusion that the defendant willfully or deliberately missed the meeting (*Stevens v. State* 599 So.2d 254 Fla. 3d DCA 1992); the 2nd DCA has held that a violation of supervision is willful only where the defendant fails to make reasonable efforts to comply with the alleged violated condition (*Rousey v. State* 226 So.3d 1015 Fla. App. 2017); Rousey's failure to timely contact his P.O. and return home was at worst due to negligence or ineptitude; therefore, the trial court abused its discretion in finding a willful and substantial violation of community control (*Rousey v. State*, *Hicks v. State* 890 So.2d 959 Fla. 2d DCA 2004, *Benedict v. State* 774 So.2d 940 Fla. 2d DCA 2001, *Jacobsen v. State* 536 So.2d 373 Fla. 2d DCA 1988, *Scott v. State* 485 So.2d 1133 So.3d 1188 Fla. 2d DCA 2014). A violation of probation will not be found where the violation is due to negligence or ineptitude (*Filmore v. State* 133 So.3d 1188 Fla. 2d DCA 2014).

In *Tanner v. State* 724 So.2d 643 Fla. App. 1999, the 1st DCA has ruled that unpreserved sentencing errors which are "fundamental" will still be corrected on direct appeal (see *Nelson v. State* 719 So.2d 1230 23 Fla. L. Weekly D2241 Fla. 1st DCA 1998, citing *State v. McInnis* 714 So.2d 429 Fla. 1988 - holding a sentence is illegal by definition when it patently fails to comport with statutory or constitutional limitations, *Hopping v. State* 708 So.2d 263 Fla. 1998). Section 924.051(3) Florida Statutes provides: an appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved, or if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court, or if not properly preserved would constitute fundamental error. The defendant properly preserved the error, filed a timely motion to withdraw plea, filed a timely direct appeal asserting a fundamental error occurred

along with an abuse of discretion, and the record that the circuit court included from the Violation of Probation Hearing on June 3, 2019, clearly shows that the defendant was only pleading to a technical violation of probation and not a substantial violation of his probation. A sentencing error may not be raised on appeal unless the error has first been brought to the attention of the trial court at the time of sentencing, or by motion pursuant to Fl. R. Crim. P. 3.800(b) (State v. Hamner 816 So.2d 810 Fla. App. 2002). The defendant submitted a motion to withdraw plea and a direct appeal, and he filed a 3.800(b) motion while the direct appeal was still pending. The 4th DCA reversed order revoking probation finding that defendant willfully and substantially violated his probation by moving from his approved residence without permission since this was the only allegation upon which the affidavit of violation was based, the 4th DCA reversed. The 4th DCA does not consider an unauthorized move from one state to another to be a minimus violation and the trial court abused its discretion (Carter v. State 659 So.2d 453 Fla. App. 1995). Probation may be revoked only upon a showing that the probationer deliberately and willfully violated one or more conditions of probation, there must have been a willful violation (Chatman v. State 365 So.2d 789 Fla. 4th DCA 1978, and Kolovrat v. State 574 So.2d 294 Fla. 5th DCA 1991). Moreover, a violation which triggers a revocation of probation must be both willful and substantial in nature and the violation must be supported by the greater weight of the evidence. The state has the burden to establish that the probationer willfully violated his terms of probation (Hightower v. State 529 So.2d 726 Fla. 2d DCA 1988). In Stevens v. State 599 So.2d 254 Fla. 3d DCA 1992, the 3rd DCA reversed the trial court's order revoking Steven's probation where there was evidence of only a technical VOP. The 3rd DCA reversed the trial court's determination of violation holding that Stevens did not willfully and deliberately violate the terms of his probation and noting that however inept and negligent Stevens' conduct may have been, the record did not support a revocation of probation. A probationer's failure to fulfill the technical terms of his probation could not constitute a violation sufficient to revoke his probation, and any violation of probation must be willful; therefore a technical violation is insufficient to justify revocation (Washington v. State 574 So.2d 400 Fla. 5th DCA 1991 and Molina v. State 52 So.2d 320 Fla. 2d DCA 1988).

For the reasons listed in this motion, the defendant respectfully requests that this honorable court of appeals grants relief by reversing the circuit court's order and remands the court to vacate Goldsboro's sentence and reinstate but immediately terminate his probation. The defendant requests an emergency review and expedited ruling based on the unique circumstances of the defendant's current pending civil trial based on this conviction, and his release from prison.

OATH

Under penalties of perjury, I declare that I have read the foregoing motion, or had it read to me, that I understand the contents, and that all of the facts alleged in the motion are true and correct.


HARRY LEE GOLDSBORO II

Defendant, PRO SE
B30111 / Jail # 4838407

CERTIFICATIONS AND ACKNOWLEDGEMENT

I certify that the motion is filed in good faith, that I have a reasonable belief that the motion is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court. I certify that I understand English and I have read the foregoing motion or had it read to me. I understand that I am subject to judicial or administrative sanctions, including but not limited to forfeiture of gain time, if this motion is found to be frivolous, malicious, made in bad faith or with reckless disregard for the truth, or an abuse of the legal process.


HARRY LEE GOLDSBORO II

Defendant, PRO SE
B30111 / Jail # 4838407

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the 5th DCA Clerk of Courts 300 S. Beach St. Daytona Beach, FL 32114-5002, the 9th Judicial Circuit Clerk of Courts 425 N. Orange Ave. Room 210 Orlando, FL 32801, Office of the State Attorney, Postconviction Felony Unit 415 N. Orange Ave. Orlando, FL 32801, and State Attorney's Office 301 South Monroe St. Suite #475 Tallahassee, FL 32301. The Brevard County Jail Law Library provided the addresses for the 5th DCA and State Attorney's Offices, so if they are incorrect, please forward the correct mailing address by mail on 11 June 2023.


HARRY LEE GOLDSBORO II

Defendant, PRO SE
B30111 / Jail # 4838407

SMART COMMUNICATIONS / BREVARD COUNTY
P.O. Box 9145

SEMIWOLE FL 33775-9145
11 JUNE 2023

FILED
OFFICE
HARRY LEE GOLOSBERG II,
Defendant

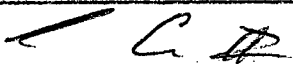
JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA
CASE NO: 2018- CF-004010-A-0
DIV: 19

AMENDMENT TO DEFENDANT'S 3,800 MOTION TO CORRECT ILLEGAL SENTENCE TO THE 9TH JUDICIAL CIRCUIT COURT

COMES NOW, on this 24th day of May 2023, the defendant/appellant, HARRY LEE GOLOSBERG II, pro se, submits this timely amendment to the defendant's 3,800 Motion to Correct Illegal Sentence in case no. 2018-CF-004010-A-0 Violation of Probation hearing. The defendant is currently incarcerated in the Brevard County Jail and does not have access to his copies of the previously filed original motions to determine and verify dates of submission and the oaths. The defendant's copies are stored in his property at Hardco C.I., but has requested copies from the Orange County Clerk of Courts. The defendant filed this amendment to his original motion to ensure it contains a proper oath. In accordance with the 2nd DCA's ruling in *Miller v. State* 617 So.2d 332 Fla. App. 1996, *Lemus v. State* 5 So.2d 388 Fla. App. 1991, and *Haywood v. State* 615 So.2d 707 Fla. App. 1992, a defendant may resubmit their motions to the court after amending them to be in technical compliance by adding a proper oath, since the original motions were timely filed; therefore, the amendment and resubmission of the motion to bring it into technical compliance is not time-barred (*Miller, Lemus, and Haywood*). The circuit court has not made a ruling in this case as of 24 MAY 2023 and this amendment is submitted timely to correct any potential technical non-compliance with a proper oath.

OATH

Under penalties of perjury, I declare that I have read the foregoing motion, or had it read to me, that I understand the motion's content, and that all of the facts alleged in the motion are true and correct.


HARRY LEE GOLDSBORO II
Defendant, PRO SE
830111 / Jail # 4838407

CERTIFICATIONS AND ACKNOWLEDGEMENT

I certify that the motion is filed in good faith, that I have a reasonable belief that the motion is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court. I certify that I understand English and have read the foregoing motion, or had it read to me. I understand that I am subject to judicial or administrative sanctions, including but not limited to forfeiture of gain time, if this motion is found to be frivolous, malicious, made in bad faith or with reckless disregard for the truth, or an abuse of the legal process.


HARRY LEE GOLDSBORO II
Defendant, PRO SE
830111 / Jail # 4838407

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the 5th DCA Clerk of Courts 300 S. Beach St. Daytona Beach, FL 32119-5002, 11th Judicial Circuit Clerk of Courts 425 N. Orange Ave. Room 210 Orlando, FL 32801, Office of the State Attorney Postconviction Felony Unit 115 N. Orange Ave. Orlando, FL 32801, and State Attorney's Office 301 South Monroe St. Suite # 425 Tallahassee, FL 32301 [The Brevard County Jail Law Library provided the addresses for the 5th DCA and State Attorney's Offices, so if they are incorrect, please forward to the correct mailing address.] by mail on 24 MAY 2023.


HARRY LEE GOLDSBORO II
Defendant, PRO SE
830111 / Jail # 4838407
SMART COMMUNICATIONS/DREMAPA COUNTY
P.O. Box 9145
SEMINOLE, FL 33775-9145
24 MAY 2023

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 2018-CF-004010-A-O
DIV.: 19

v.

DIRECTIONS TO CLERK PAGE 6

HARRY LEE GOLDSBORO II,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE

THIS MATTER came before the Court on Defendant's *pro se* "3.800 Motion to Correct an Illegal Sentence," filed on May 24, 2021. Upon reviewing Defendant's Motion, the court file, and the record, the Court finds as follows:

PROCEDURAL HISTORY

On April 27, 2004, the State charged Defendant by Information with attempted sexual battery (count one), false imprisonment (count two), and exposure of sexual organs (count three). On September 18, 2018, Defendant pled to count two and count three. The State nol-prossed count one. The court withheld adjudication, and Defendant was sentenced to a term of 40 days in the Orange County Jail with credit for 40 days' time served on each count. The court ordered Defendant to be placed on Supervised Probation for a period of three years for count two and one year for count three.

On November 6, 2018, the Florida Department of Corrections ("DOC") filed a Violation of Probation Affidavit. In the Affidavit, DOC alleged that Defendant had violated conditions three and five of his Supervised Probation by leaving his county of residence without consent and violating the law. On February 19, 2019, Defendant entered a plea of no contest on condition three of his probation.

On June 3, 2019, the court found Defendant guilty of violating condition three of his probation and adjudicated Defendant guilty as to the underlying charges. The court sentenced Defendant to five years in DOC with credit for 204 days' time served on count two and 204 days in Orange County Jail with credit for 204 days' time served on count three.

On August 14, 2019, Defendant filed a Motion to Withdraw VOP Admission. The court denied Defendant's motion on October 16, 2020. Defendant appealed. The Fifth District Court of

Appeal affirmed and issued its Mandate on July 6, 2021. *Goldsboro v. State*, 5D20-2283, 2021 WL 1940831 (Fla. 5th DCA May 11, 2021).

In the meantime, Defendant filed a Motion for Belated Plea Withdraw on April 26, 2021, a Motion to Correct, Reduce or Modify Sentence on May 24, 2021, and his first Motion for Postconviction Relief on May 27, 2021.

ANALYSIS AND RULING

"[A]n 'illegal sentence' [i]s one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." *Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014) (quoting *Williams v. State*, 957 So. 2d 600, 602 (Fla. 2007) (internal citation omitted)). Any sentence that fails to comport with statutory or constitutional limitations is deemed illegal. *Id.* (quoting *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998)). In a motion to correct a sentence, a defendant bears the burden to show clear entitlement based on the face of the record. *Johnson v. State*, 60 So. 3d 1045, 1051 (Fla. 2011). Under Rule 3.800(a), "no evidentiary hearing is allowed." *Id.* (quoting *Brooks v. State*, 969 So. 2d 238, 242 (Fla. 2007)).

In his Motion, Defendant claims the court violated sections 948.06(2)(g) and 948.06(1)(h)1.-7., Florida Statutes (2018), and violated sentencing guidelines established in rules 3.701, 3.702, and 3.703, Florida Rules of Criminal Procedure, when sentencing Defendant on his violation of probation.

Defendant violated two conditions of his probation: leaving the county without permission (condition three) and a new arrest for the criminal offense of indecent exposure (condition five). At his plea hearing on the violation of probation, Defendant pled guilty to violating condition three of his probation. (PH. 16-21.)¹ The State dismissed the underlying charge that gave rise to his

¹ Excerpts from transcripts will be designated the following way: Plea Hearing (PH. ____); and Sentencing Hearing (SH. ____.)

violation of condition five and therefore dismissed the violation of condition five. (SH. 30-31.) Defendant was ultimately adjudicated guilty on condition three and the underlying charges of false imprisonment and exposure of sexual organs and sentenced to five years in DOC.

First, Defendant contends the court violated section 948.06(2)(g), Florida Statutes (2018), by failing to dismiss the violation of condition three after the charge that was the basis for the violation of condition five was nol-prossed by the State. Specifically, Defendant violated condition five of his probation when he was charged with indecent exposure. DOC charged him with violating technical condition three for failing to get permission to leave the county because the new charge of indecent exposure occurred in a different county. According to Defendant, the State nol-prossed his indecent exposure charge; thus, his violation of condition five was dismissed. Defendant argues that the violation of condition three should have been dismissed as well.

Pursuant to section 948.06(2)(g), “[i]f the court dismisses an affidavit alleging a violation of probation or community control, the offender’s probation or community control shall continue as previously imposed, and the offender shall receive credit for all tolled time against his or her term of probation or community control.” The purpose of this section is to nullify the tolling mechanism when a court finds that a defendant did not violate his probation. *See Stambaugh v. State*, 891 So. 2d 1136, 1139 (Fla. 4th DCA 2005). Thus, Defendant’s reliance on section 948.06(2)(g) is misplaced.

Further, Defendant’s challenge of the conviction on condition three is not a cognizable claim for a 3.800(a) motion. *See, e.g., Coughlin v. State*, 932 So. 2d 1224, 1226 (Fla. 2d DCA 2006); *Plowman v. State*, 586 So. 2d 454, 456 (Fla. 2d DCA 1991); *State v. Spella*, 567 So. 2d 1051, 1051 (Fla. 5th DCA 1990); *Henry v. State*, 920 So. 2d 1204, 1205 (Fla. 4th DCA 2006); *Salazar v. State*, 675 So. 2d 654, 655 (Fla. 3d DCA 1996); *Ferenc v. State*, 563 So. 2d 707, 707

(Fla. 1st DCA 1990). Allowing Defendant to attack his conviction would infringe upon rule 3.850, Florida Rules of Criminal Procedure. *See Coughlin*, 932 So. 2d at 1226. Therefore, Defendant's first basis for relief is denied.

Second, Defendant argues that the court violated section 948.06(1)(h)1.-7., Florida Statutes (2018) when sentencing him. According to Defendant, leaving the county without permission is a low-risk technical violation pursuant to section 948.06(9), Florida Statutes (2019). Because he was a first-time violator and it was a low-risk technical violation, his probation should not have been revoked and terminated. For this claim, Defendant is relying on a version of 948.06 that was not enacted at the time he violated his probation. The version of section 948.06(9), Florida Statutes that Defendant relies on went into effect in October of 2019, which was after he was sentenced. Therefore, the language in section 948.06 that Defendant relies on for relief does not apply to him.

Lastly, Defendant maintains that the court violated sentencing guidelines established in rules 3.701, 3.703, and 3.704, Florida Rules of Criminal Procedure, by illegally sentencing him to five years in DOC. According to Defendant, the court illegally sentenced him to five years in prison which was more than a 25% deviation from his total sentence points on his scoresheet. Defendant claims that the total sentence points for his underlying offenses were 42.2, which is below the total sentence points needed for a prison sentence. He further contends that the court failed to follow the sentencing guidelines established in 3.703(d)(30)(A) and (B) and in 3.704 (d)(25), which prohibits a prison sentence of more than a 25% deviation from a defendant's total sentence points.

Here, Defendant received 36.2 total sentence points on his scoresheet. (*See Scoresheet*). The maximum possible sentence that Defendant could receive for counts two and three is five

years.² § 775.082(3)(e), Fla. Stat. (2018). Florida's Criminal Punishment Code provides that "[t]he permissible range for sentencing must be the lowest permissible sentence up to and including the statutory maximum, as defined in section 775.082, Florida Statutes, for the primary offense and any additional offenses before the court for sentencing." Fla. R. Crim. P. 3.704(26). Defendant was sentenced to five years in DOC, which is the maximum sentence. Because Defendant was sentenced within the permissible range for sentencing, his argument that the court violated the Criminal Punishment Code is without merit.

Based on the foregoing, Defendant was not given an illegal sentence; therefore, his motion is denied.

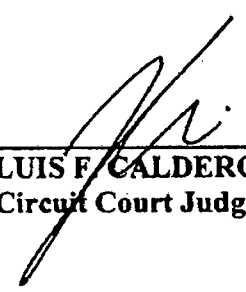
Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's "3.800 Motion to Correct an Illegal Sentence," filed on May 24, 2021, is **DENIED**.
2. Defendant may file a notice of appeal in writing within **thirty (30) days** of the date of this Order.
3. The following document(s) are hereby attached and are incorporated throughout by reference: VOP Affidavit, Plea Form, VOP Plea Hearing Transcript, Order of Disposition, Sentence, Judgment, VOP Sentencing Hearing.

² Defendant plead guilty to the charges of false imprisonment and exposure of sexual organs. False imprisonment is a third-degree felony and exposure of sexual organs is a first-degree misdemeanor. § 787.02(2), Fla. Stat. (2018); § 800.003, Fla. Stat. (2018).

4. The Clerk of Court is ordered to mail a copy of this Order to Defendant, including an appropriate certificate of service, addressed as follows: Smart Communications / Brevard County, Harry Lee Goldsboro II, ID# 4838407, PO BOX 9145, Seminole, Florida 33775-9145. The Clerk shall also file a copy of the certificate of service in the court file.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on the 24
day of May 2023.


LUIS F. CALDERON
Circuit Court Judge

Original Signed by:
Judge Luis F. Calderon
Circuit Judge, this

MAY 24 2023

Certificate of Service

I HEREBY CERTIFY that a copy of this Order has been furnished to Harry Lee Goldsboro II, ID# 4838407, Smart Communications / Brevard County, PO BOX 9145, Seminole, Florida 33775-9145; and to the Office of the State Attorney, Postconviction Felony Unit, 415 North Orange Avenue, Orlando, Florida 32801, PCF@sao9.org, SAPostConv@sao9.org, on this 24 day of May 2023.


Judicial Assistant