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

DORIAN RAFAEL ROMERO,

Movant/Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

Case Nos. 2008-cf-8896, -8898, -8899, -8902, -9655, -9669

MOTION FOR RELIEF PURSUANT TO RULES 3.800 AND 3.850 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE, OR IN THE ALTERNATIVE FOR RELIEF PURSUANT TO A PETITION FOR A WRIT OF ERROR CORAM NOBIS OR A WRIT OF HABEAS CORPUS

COMES NOW the movant/petitioner Dorian Romero, through counsel, and files this motion/petition for relief from his criminal convictions and sentences. In support thereof, he would show as follows:

FACTUAL BASIS FOR RELIEF

1. Mr. Romero was fourteen years old when he was arrested on May 9, 2008.

2. Petitions for delinquency (styled "complaints" on the docket) were filed May 20, 2008 in the first four cases.

3. On June 11, 2008, pursuant to the State's June 9, 2008 motion to transfer, the Juvenile Court waived its jurisdiction in the first four cases (numerically) and they were transferred to the Circuit Court.

4. On July 1, 2008, the Circuit Court obtained jurisdiction over the remaining two cases, Nos. 2008-cf-009655 and -9669.

5. Section 985.556(4)(c) describes eight factors the juvenile court must consider before waiving jurisdiction over a minor. Section 985.556(4)(e) provides that "Any decision to transfer a child for criminal prosecution must be in writing and include consideration of, and findings of fact with respect to, all criteria in paragraph (c). The court shall render an order including a specific finding of fact and the reasons for a decision to impose adult sanctions." The Court did not make written findings as to each factor in its order transferring jurisdiction.

6. Section 985.556(4)(d) requires an authorized agent of the Juvenile Justice Department to submit a written report on the relevant factors articulated in subsection (4)(c). "The child and the child's parents or legal guardians and counsel and the state attorney shall have the right to examine these reports and to question the parties responsible for them at the hearing."

7. The dockets do not reflect that any such report was ever filed in preparation for the hearing on the motion to transfer, in violation of Florida law. J.B. v. State, 718 So.2d 1285 (Fla. 5th DCA 1998).

8. Subsection (4)(a) requires the prosecutor to obtain and consider the recommendation of the juvenile probation officer before filing any motion to transfer. There is no indication that the prosecutor did so with respect to the charges in this case.[1]

1 Although the prosecutor does appear to have obtained a recommendation against direct-filing in Case No. 2008-CJ-944,

Subsection (4)(a) also requires the prosecutor to seek and obtain leave of court if the motion to transfer is filed more than seven business days after the original delinquency petition is filed. There is no indication the prosecutor did so in this case.

9. Mr. Romero retained counsel for his proceedings in the circuit court. Counsel negotiated a plea agreement under the youthful offender sentencing act (Section 958.04). Counsel informed Mr. Romero that he would be placed in the youthful offender basic training program during his incarceration in the Department of Corrections. Counsel did not inform Mr. Romero before the plea colloquy that such placement depended on both a recommendation by the Department of Corrections (which did occur) and on acceptance of that recommendation by the sentencing judge (which did not).

10. Counsel did not inform Mr. Romero that in addition to sentencing as an adult or pursuant to the Youthful Offender Act, Mr. Romero was eligible to sentenced as a juvenile because he was transferred from the juvenile court pursuant to the discretionary transfer procedure, and not under Section 985.556(3) or Section 985.557(2)(a-b).[2] See Section 985.565(4)(b).

11. Pursuant to the plea agreement, the Circuit Court sentenced Mr. Romero to a term of incarceration in accordance with the Youthful Offender Sentencing Act. The plea

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which was transferred to the Circuit Court on July 1, 2008 as Case 2008-CF-009655, no other recommendation appears to have been filed.

2 Section 995.557(2) applies only to juveniles aged sixteen or older. Section 995.556(3) requires transfer only for minors previously adjudicated delinquent for certain felonies: "murder, sexual battery, armed or strong-armed robbery, carjacking, home-invasion robbery, aggravated battery, aggravated assault, or burglary with an assault or battery." 995.556(3)(a). Mr. Romero had been adjudicated delinquent of burglary of a dwelling, theft, and petit theft in Case No. 2008-1244. Subsection (3)(b) only applies to juvenile repeat offenders who have committed "one or more … felony offenses involv[ing]ed the use or possession of a firearm or violence against a person." None of these criteria were present when Mr. Romero was tried as an adult.

form indicates that the Court promised that Mr. Romero would be "screened for boot camp." Based on this, on the fact that screening for the basic training program is automatic, and on representations at the plea hearing and by counsel, Mr. Romero believed that the judge had agreed not to oppose his placement in the basic training program if the Department of Corrections determined he was eligible.

12. Rule 3.710(a) of the Florida Rules of Criminal Procedure, entitled "Presentence Report," provides in relevant part that "No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the Department of Corrections received and considered by the sentencing judge." No presentence report was ever prepared.

13. Section 985.556(4)(e) provides that the order to transfer to Circuit Court "shall be reviewable on appeal under s. 985.534 and the Florida Rules of Appellate Procedure."

14. Counsel never informed Mr. Romero of his rights to appeal his sentence or the decision to transfer his case to the circuit court.

15. Section 958.045(2) provides that a sentencing judge must rule on the recommendation of the Department of Corrections for placement in the basic training program within 21 days after receipt of such a request. Failure to do so operates as an approval of placement. The Department of Corrections recommended placement in the basic training program in a letter dated February 23, 2009. The court's order denying

placement was entered on April 24, 2009. Thus, Mr. Romero should have been automatically placed in a basic training program.

16. Counsel never informed Mr. Romero that the court entered an order denying his placement in the basic training program, nor that the order itself had been entered too late to have any legal effect.

GROUNDS FOR RELIEF

1. Mr. Romero's transfer from the Juvenile Division to the Criminal Division violated Florida law and the due process clauses of the Florida Constitution and the Federal Constitution because:

a. The prosecutor did not obtain and consider the recommendation of the juvenile probation officer. Section 985.556(4)(a), Florida Statutes.

b. The Department of Juvenile Justice did not submit a written report to the Court, to Mr. Romero, or his parents describing how the statutory factors for transfer from the Juvenile Division applied in Mr. Romero's case. Section 985.556(4)(d), Florida Statutes.

c. The Court's transfer order did not address each of the eight statutory criteria for transfer from the Juvenile Division. Section 985.556(4)(c, e), Florida Statutes.

2. Mr. Romero's sentence is illegal because the Court did not obtain a presentence investigation report, in violation of Rule 3.710 of the Florida Rules of Criminal Procedure and Section 985.565(3), Florida Statutes.

3. Mr. Romero's sentence and conviction are invalid because counsel rendered ineffective assistance, in violation of the Sixth Amendment of the Constitution of the United States and Florida law, by:

a. Failing to inform Mr. Romero that he would not be placed in the basic training program unless the Department of Corrections recommended such placement and the sentencing judge agreed to it.

b. Failing to inform Mr. Romero that if he did not accept the prosecution's plea offer, he could be sentenced as a juvenile and placed in a Department of Juvenile Justice facility instead of a Department of Corrections facility.

c. Failing to inform Mr. Romero that he could appeal the decision to transfer the case from the Juvenile Division.

If counsel had informed Mr. Romero of these important facts, Mr. Romero would not have accepted the plea agreement. Instead, Mr. Romero would have either gone to trial or entered an open plea and argued at sentencing that he should have been committed to the custody of the Department of Juvenile Justice instead of the Department of Corrections.

4. Mr. Romero's plea was not knowing, voluntary, and intelligent because of counsel's ineffective assistance. Additionally, the plea agreement was violated when the judge denied Mr. Romero placement in the basic training program with no explanation

in the April 24, 2009 order. Thus, Mr. Romero's right to due process under the federal and Florida Constitutions was violated.

PROCEDURAL VEHICLES FOR MR. ROMERO'S CLAIMS

A. Rule 3.800 of the Florida Rules of Criminal Procedure

Rule 3.800(a) provides that "A court may at any time correct an illegal sentence imposed by it . . . when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief...." In Carter v. State, the Supreme Court explained that "because '[a] rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed . . . its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination." 786 So.2d 1173, 1177 (Fla. 2001) (quoting State v. Callaway, 658 So.2d 983, 988 (Fla. 1995)). Although the most common example of an illegal sentence is one that "facially exceed[s] the statutory maximums," Rule 3.800 is not limited to this class of sentencing errors. State v. Mancino, 714 So.2d 429, 433 (Fla. 1998). For example, in Saintelien v. State, the Supreme Court held that "a rule 3.800(a) motion to correct an illegal sentence may be used to challenge a sexual predator designation." 990 So.2d 494, 495 (Fla. 2008).

Here, Mr. Romero has raised claims that his case was not properly transferred to Circuit Court. These errors "involve[] a court's patent lack of authority or jurisdiction" to impose a sentence, and are therefore illegal and subject to challenge under Rule

3.800(a). Wright v. State, 911 So.2d 81, 84 (Fla. 2005). The errors are apparent from the record without need for an evidentiary hearing. Therefore, Mr. Romero asks the Court to evaluate the claims raised in Ground 1(b-c) as claims of illegal sentence cognizable in a motion pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure, and *nunc pro tunc* sentence him to incarceration in a juvenile facility rather than the Department of Corrections.

B. Rule 3.850/Petition for Writ of Error *Coram Nobis*

Rule 3.850 of the Florida Rules of Criminal Procedure provides the most common vehicle for challenging a conviction. According to Rule 3.850, a claim for relief from judgment or sentence exists when:

> (1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.
> (2) The court did not have jurisdiction to enter the judgment.
> (3) The court did not have jurisdiction to impose the sentence.
> (4) The sentence exceeded the maximum authorized by law.
> (5) The plea was involuntary.
> (6) The judgment or sentence is otherwise subject to collateral attack.

A writ of error *coram nobis* is the appropriate vehicle for bringing these challenges when a petitioner is not "in custody" pursuant to the conviction being challenged. Bates v. State, 887 So.2d 1214, 1217 (Fla. 2004). A petitioner is considered to be "in custody" when the previous convictions have been used to enhance a second sentence currently

being served. Id. It is not clear whether Mr. Romero is currently in custody pursuant to the convictions in this case.[3]

Rule 3.850 motions are subject to a two-year limitations period, measured from the date the conviction and sentence become final. Rule 3.850(b). Three enumerated exceptions exist for claims that could not have been discovered earlier through the exercise of due diligence, for new rules of constitutional law determined to apply retroactively, and for movants who retained counsel who failed to timely file a Rule 3.850 motion. Rule 3.850(b)(1-3). The same limitations period applies to any Petition for a Writ of Error Coram Nobis. Wood v. State, 750 So.2d 592, 594-95 (Fla. 1999).

However, Florida courts recognize other exceptions when justice requires. For example, in Demps v. State, the Third District Court of Appeals held that, in order to preserve the right of access to the courts, the two-year limitations period is tolled while an inmate is confined without access to Florida legal materials. 696 So.2d 1296, 1297 (Fla. 3d DCA 1997). Mr. Romero asks this Court to toll the limitations until the day he turned eighteen – September 22, 2011. With this tolling, Mr. Romero's motion would be timely as to all of his claims. Thus, Mr. Romero asks the Court to consider his claims under Rule 3.850 (or as a petition for a writ of *coram nobis*) and vacate his convictions and sentences.

3 On August 28, 2013, a jury found Mr. Romero guilty of burglary of a dwelling in Case No. 2012-cf-002285 (Orange County Circuit Court). On September 13, 2012, the State filed a notice of intent to seek an enhanced Prison Releasee Reoffender sentence under Section 775.082(9)(a)(3) of the Florida Statutes. As of today, sentencing is scheduled for September 20, 2013.

C. Petition for Writ of Habeas Corpus

If this Court does not find that the limitations period for filing a Rule 3.850 motion should be tolled, Mr. Romero requests that the Court evaluate his claims for relief as a petition for a writ of habeas corpus. A petition for a writ of habeas corpus is available when "the remedy by motion is inadequate or ineffective to test the legality of [the petitioner's] detention." Baker v. State, 878 So.2d 1236, 1241 (Fla. 2004). If the limitations period for filing a Rule 3.850 motion cannot be tolled until the date of Mr. Romero's eighteenth birthday, then Rule 3.850 is inadequate and ineffective to test the legality of Mr. Romero's detention, and his claims should be cognizable in a writ of habeas corpus.

Additionally, Mr. Romero's claims are cognizable in a writ of habeas corpus because the unique circumstances of Mr. Romero's case render the convictions and sentences in this case manifestly unjust. A fundamental error occurs when a court lacks jurisdiction, or the interests of justice are so compelling that the error should be corrected. Holiday v. State, 753 So.2d 1264, 1269 (Fla. 2000). The voluntariness of a juvenile's plea can be challenged through a writ of habeas corpus. State v. S.S., 40 So.3d 6, 8 (Fla. 4th DCA 2010) (citing State v. T.G., 800 So.2d 204 (Fla. 2001)).

At age fourteen, Mr. Romero was convicted of a felony and sentenced to a term of incarceration in the Department of Corrections. Mr. Romero accepted a sentencing agreement because counsel told him that he would otherwise face a ten-year adult

sentence. Mr. Romero had no idea that other options existed, including seeking juvenile sentencing as opposed to sentencing as an adult or as a youthful offender. Mr. Romero was thus deprived of an opportunity to avoid the collateral consequences attendant a conviction as adult. Section 985.35(6), Florida statutes ("nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction or to disqualify or prejudice the child in any civil service application or appointment).[4] Counsel also deprived Mr. Romero of any meaningful opportunity to raise on appeal his meritorious challenges to his transfer to the Circuit Court by failing to provide any advice on Mr. Romero's right to appeal. Had Mr. Romero understood that he could have challenged his transfer to the Circuit Court, he would have pursued such an appeal.

Moreover, Mr. Romero believed that he would definitely receive the treatment and structured environment necessary for a successful transition through the basic training program. Mr. Romero was not warned before the plea proceedings that the placement in the program required two intermediate steps: (1) recommendation from the Department of Corrections (which occurred); and, (2) approval by the sentencing judge (which was denied). Moreover, although Mr. Romero's placement in a basic training program should have been considered automatically approved when the sentencing judge failed to respond within twenty-one days, counsel did not advocate on Mr. Romero's behalf to

4 A summary of the collateral consequences to which Mr. Romero is now subject may be obtained at http://www.abacollateralconsequences.org. To view these consequences, select Florida from the map, then view the consequences imposed for convictions for "all felonies," "all misdemeanors," and "crimes of violence."