

**IN THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, STATE OF FLORIDA**

Case No. _____

DAVID W. GRIFFIN,

Petitioner,

v.

WALTER A. MCNEIL,
in his official capacity as the
Secretary of the Florida Department
of Corrections, and the
STATE OF FLORIDA.

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

In 1975, Petitioner was convicted and sentenced to life in prison. His sentence was illegal. The maximum sentence under the law was fifteen years. Petitioner, proceeding *pro se*, has repeatedly informed the circuit court and this Court of this. But the circuit court has denied any relief, and this Court has affirmed these rulings in per curiam decisions without an opinion. Petitioner, now represented by counsel, petitions this Court to issue a writ of habeas corpus directing the Respondents to immediately release him from their custody.

I. BASIS FOR INVOKING JURISDICTION

This Court may issue a writ of habeas corpus under: Article V, Section 4(b)(3), Florida Constitution (1968); section 79.01, Florida Statutes (2008); and Rule 9.030(b)(3), Florida Rules of Appellate Procedure. This Petition is brought under the procedures in Rule 9.100, Florida Rules of Appellate Procedure.

Herein, Petitioner collaterally attacks and challenges the legality of his sentence imposed by the circuit court in Broward County. Normally, such a challenge would be by way of a motion filed in the circuit court under Rule 3.800 of the Florida Rules of Criminal Procedure. *Leichtman v. Singletary*, 674 So. 2d 889, 891-92 (Fla. 4th DCA 1996). However, in this case, any Rule 3.800 motion would be futile because the circuit court, under the law of the case doctrine, cannot provide any relief; only this Court can. *See infra* Part IV.C.

Because Petitioner was sentenced in Broward County (over which this Court has jurisdiction) and because this Petition challenges the legality of that sentence, this Court is the proper forum to file this petition. It would be improper to file the Petition in the Third District Court of Appeal, the district court of appeal that has jurisdiction over the county, Miami-Dade, where Petitioner is incarcerated. *See Johnson v. State*, 947 So. 2d 1192, 1192 (Fla. 3d DCA 2007) (holding that, when petition for habeas corpus challenges the validity of the judgment and sentence, it should be filed in the jurisdiction where the judgment and sentence were imposed);

see also Ross v. State, 901 So. 2d 252, 252 (Fla. 4th DCA 2005) (granting a habeas petition for a prisoner located in the Fifth District who was challenging a sentence imposed by a circuit court sitting in the Fourth District).

II. STATEMENT OF FACTS¹

A. Petitioner's Conviction

In its Information, the State charged that the Petitioner on or about August 15, 1975 “did, by force, violence or putting [the victim] in fear, feloniously rob, steal and take away from the person or custody of the [victim]” more than \$100 in money “contrary to F.S. 813.011.” (APP 25, 34.) Importantly, nowhere in the Information did the State charge that, in the course of the robbery, the Petitioner was carrying a firearm, a deadly weapon, or any weapon. (APP 25, 34.) By its verdict, the jury found the Petitioner “guilty of robbery, as charged in the [I]nformation.” (APP 26.) On December 10, 1975, the circuit court entered its “Felony Judgment and Sentence” and sentenced Petitioner to life imprisonment. (APP 28.) Petitioner did not appeal his conviction or sentence. (APP 29.) Today, he is in the custody of the Department of Corrections solely for this 1975 robbery conviction and not for any other crime. (APP 21-22.) As of the date of the service

¹ Petitioner attests to the truth of the matters asserted herein. *Infra* at 26. Citations herein are to a single-volume appendix being filed with this Petition.

of this Petition, Petitioner has served more than 22 years (8,174 days) for his 1975 robbery conviction.² (APP 23.)

B. Legislative Changes in the Robbery Statute

The 1973 robbery statute allowed a court to impose a life sentence on a defendant convicted of robbery, regardless of whether or not the defendant was carrying a weapon in the course of the robbery. Specifically, the 1973 statute stated:

Robbery defined; penalties. Whoever, by force, violence or assault or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property which may be the subject of larceny, shall be guilty of a felony of the first degree, punishable by imprisonment in the state prison for life or for any lesser term of years, at the discretion of the court

§ 813.011, Fla. Stat. (1973); (APP 155). The State cited this 1973 robbery statute in its Information. (APP 25, 34.)

The Legislature revised the robbery statute a year before Petitioner committed the robbery for which he was sentenced. Ch. 74-383, § 38, at 1244, Laws of Florida (approved by the Governor on July 3, 1974); (APP 156-57). These revisions took effect on July 1, 1975 – six weeks *before* Petitioner committed the robbery for which he was sentenced. Ch. 74-383, § 67, at 1256,

² From May 27, 1980 until March 4, 1991, Petitioner was not in the State's custody (APP 22), and instead was in the custody of federal officials serving a sentence for an unrelated federal offense. Petitioner has completed his federal sentence.

Laws of Florida; (APP 156-57). The revised robbery statute effective July 1, 1975 provided as follows:

(1) “Robbery” means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in chapter 775.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in chapter 775.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree.

Ch. 74-383, § 38, Laws of Florida; § 812.13, Fla. Stat. (1974 supp); (APP 156-58);³ *see also* § 812.13, Fla. Stat. (1975); (APP 159-60).⁴

³ The robbery statute was to be moved to section 811.011. Ch. 74-383, § 38, at 1244 Laws of Florida; (APP 120); *see also* § 813.011, Fla. Stat. (1974 Supp.); (APP 122). The drafters of the Florida Statutes, however, codified the new robbery statute at section 812.13. § 812.13, Fla. Stat. (1975); (APP 123); § 812.13, Fla. Stat. (1974 supp); (APP 122); *see also Cochran v. State*, 899 So. 2d 490, 491-92 (Fla. 2d DCA 2005) (discussing mistakes made in codifying the new statute).

⁴ A note at the end of Section 812.13, Florida Statutes (1975) indicates that subsection (2) of the statute, as amended, took effect on October 1, 1975. (APP 160.) This note, however, refers to technical amendments from a later bill. *See* Ch. 75-298, §§ 29, 50 at 1092-93, 1098, Laws of Florida; (APP 165-66). The amendments at issue in this case took effect on July 1, 1975. Ch. 74-383, §§ 38, 67, at 1244, 1256, Laws of Florida; (APP 156-57).

The effect of the 1975 revisions was to reduce the maximum sentence from life to fifteen years for the crime of “simple robbery” – that is, a robbery in which the defendant was not carrying a weapon. *See* § 812.13(2)(c), Fla. Stat. (1975) (making it a second degree felony for a robbery where the offender carried no firearm, deadly weapon, or other weapon); (APP 123); § 775.082(3)(c), Fla. Stat. (1975) (stating that a person convicted of a second degree felony (like simple robbery) could be sentenced to a term of years “not exceeding 15 years”); (APP 125-26). Judge Alterbernd has succinctly summarized the effect of the 1975 revisions:

The revisions divided robbery into three different degree offenses. After July 1, 1975, simple robbery was a second-degree felony punishable by a term of fifteen years’ imprisonment. In order to allege one of the two higher degrees of robbery, the State was required to include an allegation within the count charging robbery, stating that the defendant carried either a deadly weapon, including a firearm, or a weapon during the robbery.

Cochran v. State, 899 So. 2d 490, 492 (Fla. 2d DCA 2005). As noted above, the State in its Information did not allege that Petitioner was carrying a firearm or any other weapon during the course of the robbery. (APP 25, 34.)

C. Petitioner's Post-Conviction Challenges

Petitioner, proceeding *pro se*, filed his first post-conviction challenge to his illegal sentence in a Rule 3.850 motion filed in 1978.⁵ (APP 29-31.) Therein, he asserted the same claim that he asserts in this Petition – that is, his sentence exceeded the maximum authorized by law. (APP 29-31.) Specifically, Petitioner informed the circuit court that: (1) he had been charged by the Information of having committed a robbery on August 15, 1975; (2) the Information did not allege that he had carried a weapon in the course of the robbery; and (3) thus, under the robbery statute in effect at the time of his offense, the maximum sentence he could receive was fifteen years. (APP 29-30.) With his motion, Petitioner provided to the court a copy of *Chapola v. State*, 347 So. 2d 762 (Fla. 1st DCA 1977), which held that the state's failure to allege armed robbery in the information required a defendant's life sentence to be vacated and for him to be re-sentenced to no more than fifteen years. (APP 33, 37-39.)

The circuit court summarily denied the Petitioner's Rule 3.850 motion, and it failed to attach portions of the record, if any, that refuted Petitioner's claim. (APP 42.) Petitioner appealed. (APP 43.) This Court affirmed in a per curiam

⁵ When Petitioner filed his Rule 3.850 motion in 1978, Rule 3.850 did not have the two-year limitation that it has today. *See Fla. Bar Re Amendment to Rules of Crim. Procedure (rule 3.850)*, 460 So. 2d 907 (Fla. 1984) (amending Fla. R. Crim. P. 3.850 to add two-year limitation).

decision without opinion. *Griffin v. State*, Case No. 78-1995, 366 So. 2d 904 (Fla. 4th DCA 1978); (APP 44-46).

More recently in 2004 and 2006, Petitioner, proceeding *pro se*, filed two separate Rule 3.800 motions challenging his life sentence as illegal. (APP 47-51, 91-103.) These motions raised the same claim that Petitioner asserted in his 1978 motion and that he asserts in this Petition.⁶ (APP 29-30, 32-33, 47-51, 91-103.)

In response, the State argued that Petitioner's motions were successive and barred under the doctrines of law of the case, collateral estoppel, and res judicata. (APP 54-56, 73-74 & n.1, APP 105-08, 116-20.) In addition, the State argued, *inter alia*, that: (1) Petitioner's life sentence was authorized under the 1973 statute, and the 1975 revisions to the robbery statute did not take effect until October 1, 1975, six weeks after Petitioner committed the robbery; (2) Petitioner had waived any challenge based on the Information by failing to object to the Information at the time of trial; and (3) other documents in the record (such as the probable cause affidavit) indicated an offense of armed robbery. (APP 52-53, 74-78, 168-78.)

The circuit court (Honorable Cheryl J. Aleman) adopted the State's arguments, denied Petitioner's motions, and barred Petitioner from any further *pro*

⁶ In his second motion filed in 2006, the Petitioner, proceeding *pro se*, contended that he was not raising the same claim that he had raised in his prior post-convictions motions. (APP 93-94, 101-02.) Petitioner, now represented by counsel, concedes that all his prior post-conviction motions raised the same claim being raised in this Petition.

se filings in the circuit court. (APP 67, 80, 121.) Petitioner appealed these rulings. (APP 81, 122) This Court twice affirmed these rulings in per curiam decisions without opinions, and the Supreme Court of Florida declined to review this Court's most recent per curiam decision. *See Griffin v. State*, Case No. 4D06-3520, 942 So. 2d 891 (Fla. 4th DCA 2006), *pet. for review denied*, SC06-2520, 948 So. 2d 759 (Fla. 2007); *Griffin v. State*, Case No. 4D05-4336, 919 So. 2d 457 (Fla. 4th DCA 2005); (APP 83, 145).

III. NATURE OF RELIEF SOUGHT

Petitioner asks this Court to issue a writ of habeas corpus that directs the Respondents to immediately release Petitioner from their custody. Habeas relief is the proper remedy. *Infra* Part IV.C.

If this Court disagrees that habeas is the proper remedy and determines that Petitioner should have first filed his third Rule 3.800 motion in the circuit court and then appealed the denial of that motion to this Court, Petitioner requests that this Court construe this Petition as a Rule 3.800 motion and transfer it to the circuit court for its consideration in the first instance. However, as argued below, this is a futile act that would only serve to unnecessarily delay Petitioner's immediate release from prison. This is so because, under law of the case principles, the circuit court has no discretion and must deny such a Rule 3.800 motion. Only this Court may provide relief to Petitioner. *Infra* Part IV.C.

If Petitioner's release from prison may be obtained by some other form of relief not mentioned herein, Petitioner requests that this Court exercise its discretion under Fla. R. App. P. 9.040(c) and treat this petition as seeking the other form of relief that results in Petitioner's immediate release from prison.

IV. ARGUMENT

This argument has three parts. First, Petitioner – who has served twenty-two plus years for his offense – is serving a life sentence not authorized by law; the maximum sentence authorized by law was fifteen years. *Infra* Part IV.A. Second, Petitioner's unlawful life sentence is a manifest injustice, and thus his claim for immediate release is not barred by the doctrines of res judicata, collateral estoppel, or the law of the case. *Infra* Part IV.B. Third, seeking habeas relief in this Court is the only adequate and effective remedy to correct the manifest injustice that Petitioner has suffered, as the circuit court cannot provide relief to Petitioner under Rule 3.800 or under any other remedy. *Infra* Part IV.C.

A. The circuit court unlawfully sentenced Petitioner to life in prison, as the statutory maximum was fifteen years.

Under the federal and state constitutions, the state in its charging document must allege the essential facts of the offense of which the defendant is accused and convicted. *Clay v. State*, 595 So. 2d 1052, 1053 (Fla. 4th DCA 1992) (citing Art.I, §§ 9, 16, Fla. Const. (1968)); *see also* U.S. Const. amends. VI, XIV. The state's

failure to do this is a constitutional defect and fundamental error that can be raised at any time, as this Court has explained:

“A conviction on a charge not made by the indictment or information is a denial of due process of law. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *De Jonge v. Oregon*, 299 U.S. 353 (1937). If the charging instrument completely fails to charge a crime, therefore, a conviction thereon violates due process. Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time – before trial, after trial, on appeal, *or by habeas corpus.*”

Fulcher v. State, 766 So. 2d 243, 244 (Fla. 4th DCA 2000) (emphasis added) (quoting *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983)); accord *White v. State*, 973 So. 2d 638, 640 (Fla. 4th DCA 2008)); see *Cox v. State*, 530 So. 2d 464, 466 (Fla. 5th DCA 1988) (“To sentence for a crime more serious than the statute under which the crime is charged is fundamental error.” (internal quotations omitted).)⁷

Since July 1, 1975 (six weeks *before* Petitioner committed the robbery), the State of Florida has had three separate offenses under its robbery statute: (i) simple

⁷ Granted, as the State argued below, the failure to allege in the information an essential element of the crime is not fundamental error *if* the information alleges the correct statute allegedly violated by the defendant. See *Fulcher*, 766 So. 2d at 244-45 (cited at APP 75-76). Similarly, as the State argued below, merely citing the incorrect statute in the information is not grounds for vacating the conviction *if* the information alleges all the essential elements of the offense. See *Morales v. State*, 785 So. 2d 612, 614 (Fla. 3d DCA 2001) (cited at APP 76-77). Here, however, the Information alleged neither the essential elements of armed robbery nor the correct statute for armed robbery. (APP 25, 34.) Therefore, as argued in the text, the error was fundamental and can be raised at any time.

robbery punishable by a maximum sentence of fifteen years; (ii) robbery with a weapon punishable by a maximum sentence of thirty years; and (iii) robbery with a firearm or deadly weapon punishable by a maximum sentence of life.⁸ See Ch. 74-383, §§ 38, 67, at 1244, 1256, Laws of Florida; § 812.13, Fla. Stat. (1974 supp); § 775.082 (3)(c), Fla. Stat. (1975); *Cochran v. State*, 899 So. 2d 490, 492 (Fla. 2d DCA 2005).

The State in its Information only charged the Petitioner of committing the offense of simple robbery (not armed robbery). (APP 25, 34.) Nowhere in the Information did the State allege that Petitioner was carrying a weapon in the course of the robbery. (APP 25, 34.) The jury found Petitioner guilty only of the offense charged in the Information (simple robbery, not armed robbery). (APP 26.)

Accordingly, under settled law, Petitioner could have been convicted only of simple robbery (not armed robbery) and sentenced to no more than fifteen years. *Sanders v. State*, 386 So. 2d 256, 257 (Fla. 5th DCA 1980) (holding that “[s]ince the indictment did not charge that appellant was armed with either a firearm, a deadly weapon or a weapon,” he could be found guilty only of simple robbery and his sentence of nineteen years had to be vacated); *Skinner v. State*, 366 So. 2d 486,

⁸ The State mistakenly argued below, and the circuit court agreed, that the 1973 statute governed and that the pertinent revisions to the 1975 robbery statute took effect on October 1, 1975, six weeks after the robbery. (APP 52-53, 67.) The State reached its mistaken conclusion by relying on a note at the end of Section 812.13, Florida Statutes (1975). See *supra* note 4.

487 (Fla. 3d DCA 1979) (holding that because the information charged the defendant with “unarmed robbery” and because the jury found him guilty only of this charge, the defendant’s life sentence had to be vacated and he had to be re-sentenced to fifteen years); *Chapola v. State*, 347 So. 2d 762, 763-64 (Fla. 1st DCA 1977) (holding that the state’s failure to allege armed robbery in the information meant that the defendant’s life sentence had to be vacated and that he had to be re-sentenced to no more than fifteen years); *see Clemon v. State*, 473 So. 2d 271, 273-74 (Fla. 3d DCA 1985) (holding that since neither the information nor the jury verdict referred to robbery with a deadly weapon, defendant’s life sentence had to be vacated); *Miller v. State*, 370 So. 2d 73, 73 (Fla. 2d DCA 1979) (holding that, because the information did not charge robbery with a deadly weapon, the defendant’s life sentence had to be vacated); *see also T.S. v. State*, 808 So. 2d 1276, 1277 (Fla. 4th DCA 2002) (cited by the State at APP 78) (holding that defendant’s conviction for assault on a school board employee had to be reclassified as simple assault because the information failed to allege either the correct statute or all the essential elements for the offense of assault on a school board employee).

The most cogent discussion on this point of law is Judge Alterbernd’s opinion in *Cochran v. State*, 899 So. 2d 490 (Fla. 2d DCA 2005). In that case, just two-and-half weeks after the 1975 robbery statute took effect, the defendant

committed a robbery while carrying a firearm. *Id.* at 491. The state, however, failed to properly charge the defendant, as it charged him in Count I with simple robbery and cited the 1973 robbery statute. *Id.* The state also charged the defendant in Count II of having engaged in a criminal offense while having a firearm. *Id.* The jury found the defendant guilty of both offenses, and the trial court sentenced the defendant to life for the robbery charge in Count I. *Id.*

Speaking through Judge Alterbernd, the Second District held that the defendant's life sentence had to be vacated, and it ordered the trial court to take immediate steps to secure Petitioner's release. *Id.* at 491-93. The Second District ordered this even though it was undisputed that, based on the jury's finding on Count II, the defendant had been carrying a firearm at the time of the robbery offense. *Id.* at 491. The Second District acknowledged that the defendant could have been sentenced to life if the state had properly charged him. *Id.* But, because the state did not properly charge the defendant, his maximum sentence was fifteen years, and his life sentence was unlawful. *Id.* at 491-93.

The facts of the instant case are even more compelling for Petitioner's immediate release. Here, on its face, the Information does not allege anything at all about Petitioner carrying a firearm or weapon. (APP 25, 34.) Perhaps equally important, the jury's verdict, on its face, does not disclose that the jury found the

Petitioner guilty of carrying a firearm or weapon in the course of the robbery.⁹ (APP 26.) Because Petitioner was neither charged with nor found guilty of armed robbery, the circuit court could only sentence Petitioner to a term of imprisonment of fifteen years or less; the circuit court's sentence of life imprisonment was not authorized by law. *See Cochran*, 899 So. 2d at 491-93; *supra* at 12-13 (citing cases). Both the Department of Corrections' website and Petitioner's attestation to this Petition prove that he currently is in custody solely for this simple robbery charge. (APP 21-22); *infra* at 26. Because Petitioner has served twenty-two plus years for this simple robbery charge (seven years more than authorized by law), this Court should order the Respondents to immediately release Petitioner.

B. The manifest injustice of unlawfully imprisoning Petitioner for life precludes the application of the doctrines of res judicata, collateral estoppel, and law of the case.

Petitioner concedes that, when he was proceeding *pro se*, he raised the post-conviction claim raised herein on three previous occasions. The circuit court denied relief each time, and this Court has affirmed three times without opinion. *See Griffin v. State*, Case No. 4D06-3520, 942 So. 2d 891 (Fla. 4th DCA 2006),

⁹ As it did in the circuit court, the State may rely on statements in the record made by law enforcement to prove that Petitioner was, in fact, carrying a weapon in course of the robbery. (APP 53-54, 168-78.) This is immaterial, as demonstrated by *Cochran* where the court reduced the defendant's life sentence even though the jury there found, in a separate charge, that the defendant was carrying a weapon at the time of the offense. If a jury's finding is insufficient, then mere statements in the record, not subject to cross examination or found to be true by a jury, must also be insufficient.

pet. for review denied, SC06-2520, 948 So. 2d 759 (Fla. 2007); *Griffin v. State*, Case No. 4D05-4336, 919 So. 2d 457 (Fla. 4th DCA 2005); *Griffin v. State*, Case No. 78-1995, 366 So. 2d 904 (Fla. 4th DCA 1978); (APP 42, 44-46, 67, 80, 83, 90, 121, 145, 152). In a normal, run-of-the-mill case, Petitioner's claims would be barred by the doctrines of res judicata, collateral estoppel, and law of the case.

But this is not a normal, run-of-the-mill case. In this case, the circuit court sentenced Petitioner to life, although the law only authorized the court to sentence Petitioner to fifteen years. In other words, Petitioner is serving a life sentence for a robbery conviction even though the maximum sentence under the robbery statute was fifteen years. *Supra* Part IV.A. And, unfortunately, this Court has thrice allowed this mistake to go uncorrected, costing the Petitioner seven plus years of freedom. This is a manifest injustice that this Court should and must correct. *See Adams v. State*, 957 So. 2d 1183, 1186 (Fla. 3d DCA 2006) (“[W]here . . . the court finds that a manifest injustice has occurred, it is the responsibility of that court to correct the injustice if it can.”)

When there is a “manifest injustice,” a court should disregard the doctrines of res judicata, collateral estoppel, and law of the case. *State v. McBride*, 848 So. 2d 287, 291-92 (Fla. 2003); *accord Ranes v. State*, 913 So. 2d 742, 743 (Fla. 4th DCA 2005). The courts frequently have invoked this “manifest injustice” exception when a person has been wrongfully convicted or imprisoned. *See, e.g.*,

Williams v. State, 947 So. 2d 694, 694 (Fla. 4th DCA 2007) (granting habeas relief to petitioner because this Court lacked the power to provide any other relief and the failure to provide any relief would be a manifest injustice); *Lago v. State*, 975 So. 2d 613, 614 (Fla. 3d DCA 2008) (invoking the manifest injustice exception and holding the law of the case did not apply when defendant's conviction was "patently illegal" under the Double Jeopardy Clause); *Stephens v. State*, 974 So. 2d 455 (Fla. 2d DCA 2008) (exercising habeas power to correct a manifest injustice resulting from the appellate court's prior erroneous decision); *Adams*, 957 So. 2d at 1186 (granting habeas petition, even if defendant's post-conviction claim was time barred under Rule 3.850, because defendant's life sentence was a "manifest injustice").

An analogous case is this Court's decision in *Ross v. State*, 901 So. 2d 252 (Fla. 4th DCA 2005). There, the circuit court illegally sentenced the defendant as a prison release offender. *Id.* at 252. The defendant initially raised this sentencing illegality in a Rule 3.850 motion and then later in three, separate Rule 3.800 motions. *Id.* at 252-53. The circuit court denied each of these four motions, and this Court affirmed each denial and did so without an opinion in the three of the four appeals. *Id.* The circuit court prohibited the defendant from any further *pro se* filings, and as a result, the defendant filed a *pro se* petition for writ of habeas corpus in this Court. *Id.* Realizing that the defendant's sentence was illegal, this

Court granted the writ. *Id.* at 254. This Court rejected the state's argument that the law of the case doctrine barred the defendant's habeas claim, and it also rejected the state's argument that no manifest injustice would occur if the Court denied habeas relief. *Id.*

Also analogous is *Cillo v. State*, 913 So. 2d 1233 (Fla. 2d DCA 2005). There, the circuit court sentenced defendant to nearly forty-five years in prison when the maximum sentence under the statute was fifteen years. *Id.* at 1233-34. The defendant previously had claimed in a Rule 3.800 motion that his 45-year sentence was illegal, but the circuit court denied the motion and the Second District affirmed. *Id.* at 1233 (citing *Cillo v. State*, 884 So. 2d 29 (Fla. 2d DCA 2004)). The defendant repeated the exact same claim in a second Rule 3.800 motion. The Second District held, "Although this claim would typically be collaterally estopped, we are nevertheless compelled to correct a manifest injustice because, as the State concedes, [the defendant's] sentence exceeds the statutory maximum." *Id.*

Petitioner's case is indistinguishable from *Ross* and *Cillo*. Petitioner, like the defendants in *Ross* and *Cillo*, was illegally sentenced to a sentence longer than the maximum authorized by statute. Petitioner, like the defendants in *Ross* and *Cillo*, previously has claimed on multiple occasions that his sentence was illegal, but the circuit court and this Court have denied each of these claims. Though these

prior decisions would collaterally estop a typical claim, it would be a manifest injustice for this Court to fail to correct its prior errors and to allow Petitioner to continue to serve an illegal life sentence. *See Ross*, 901 So. 2d at 254; *Cillo*, 913 So. 2d at 1233. Because of this manifest injustice, this Court should disregard the doctrines of res judicata, collateral estoppel, and law of the case, just as this Court did in *Ross* and the Second District did in *Cillo*. *See Ross*, 901 So. 2d at 254; *Cillo*, 913 So. 2d at 1233.

The manifest injustice in this case is amplified by the fact that thirty years ago Petitioner promptly notified the courts of the illegality of his sentence. (APP 29-33. Yet, the circuit court and this Court erred in rejecting his claim in 1978. (APP 42, 44-46); *Griffin v. State*, Case No. 78-1995, 366 So. 2d 904 (Fla. 4th DCA 1978). Contemporaneously, other courts in this state were getting it right. They were shortening the illegal life sentences of defendants who, like Petitioner, had been convicted only of simple robbery. *See, e.g., Chapola v. State*, 347 So. 2d 762, 763-64 (Fla. 1st DCA 1977) (submitted with Petitioner's 1978 motion); *supra* at 11-12 (citing cases). They were shortening these sentences for prisoners who filed post-conviction Rule 3.850 motions, just as Petitioner did in 1978. *See, e.g., Sanders v. State*, 386 So. 2d 256, 257 (Fla. 5th DCA 1980); *Skinner v. State*, 366 So. 2d 486, 486-87 (Fla. 3d DCA 1979). Regrettably, this Court got it wrong in

1978. Consequently, for the past seven plus years, Petitioner has been illegally imprisoned.

In conclusion, while the doctrines of res judicata, collateral estoppel, and law of the case further important judicial policies, those important policies must give way where a manifest injustice exists. A manifest injustice exists in this case because Petitioner has been unlawfully sentenced to life in prison; he should have been released from prison more than seven years ago.

C. Seeking habeas relief in this Court is the only available remedy to correct the manifest injustice that Petitioner has suffered.

Normally, Petitioner's claim that his life sentence is illegal would be made by way of a Rule 3.800 filed in the circuit court. That rule states, "A court may at any time correct an illegal sentence imposed by it" Fla. R. Crim. P. 3.800(a). But the court that imposed Petitioner's illegal sentence – the circuit court – is powerless to provide any relief to Petitioner because of law of the case principles. Furthermore, because filing any Rule 3.800 motion in the circuit court would be futile, seeking habeas relief in this Court is the only available remedy to correct the manifest injustice suffered by Petitioner.

As discussed above, the law of the case does not preclude this Court, as the appellate court, from correcting its prior decisions and providing relief to Petitioner if its prior decision would result in a "manifest injustice." *Supra* Part IV.B; *e.g.*, *Lago v. State*, 975 So. 2d 613, 614 (Fla. 3d DCA 2008). The circuit court,

however, does not have that same power. The law of the case doctrine requires the circuit court – unlike this Court – to abide by this Court’s prior decisions even if doing so results in a manifest injustice.¹⁰ See *Lago*, 975 So. at 614 (discussed below); see also *Brunner Enters. v. Dep’t of Revenue*, 452 So. 2d 550, 552 (Fla. 1984) (“Lower courts cannot change the law of the case as decided by . . . the highest court hearing a case.”); see also *Crouch v. Pub. Serv. Comm’n*, No. 1D07-6060, at 2 (Fla. 1st DCA Oct. 24, 2008) (slip op.) (declining to address the manifest injustice exception because, in a prior appeal in the same case, a higher court already had decided the issue).

Therefore, filing a Rule 3.800 motion in the circuit court would be futile and would not result in any relief to the Petitioner. For example, in *Lago*, notwithstanding the manifest injustice of the prior appellate decision, the circuit court was required to follow that prior appellate decision. *Id.* at 614. Thus, the Third District held that the circuit court “correctly” denied the petitioner’s Rule

¹⁰ This Court necessarily decided Petitioner’s instant claim adversely to him when, in its prior decisions, it affirmed the circuit court’s denials of Petitioner’s Rule 3.850 and Rule 3.800 motions. See *Schultz v. Schickedanz*, 884 So. 2d 422, 424 (Fla. 4th DCA 2004) (holding that issues briefed in prior appeal are necessarily decided even if the appellate court affirms per curiam without opinion). In contrast, by denying review of this Court’s 2006 decision, the Supreme Court of Florida did not necessarily decide any issues. Nor did the supreme court establish law of the case that binds this Court or in any way preclude this Court from invoking the manifest injustice exception. See Philip J. Padovano, *Florida Appellate Practice* § 18.12, at 372 & n.11 (2007-08 ed.) (noting that dismissal of appeal is not law of the case binding on the lower court).

3.800 motion raising the same claim decided in the prior appellate decision. *Id.* Nevertheless, when the defendant appealed this “correct” decision of the circuit court, the Third District construed the notice of appeal as a petition for writ of habeas corpus and invoked the manifest injustice exception to overrule its own prior decision and the circuit court’s adherence to that prior decision. *Id.* In accordance with *Lagos*, Petitioner files this Petition for a writ of habeas corpus rather than file a futile Rule 3.800 motion in the circuit court.

The courts frequently have resorted to habeas corpus where, as here, no other adequate or effective remedy is available. As Justice Anstead has opined, the writ of habeas corpus “is enshrined in our Constitution to be used as a means to correct manifest injustices[,] and its availability for use when all other remedies have been exhausted has served our society well over many centuries.” *Baker v. State*, 878 So. 2d 1236, 1246 (Fla. 2004) (Anstead, J. concurring specially); *see also* Fla. R. Crim. P. 3.850(h) (preserving habeas corpus as a remedy when “the remedy by motion is inadequate or ineffective to test the legality of the applicant’s detention”).

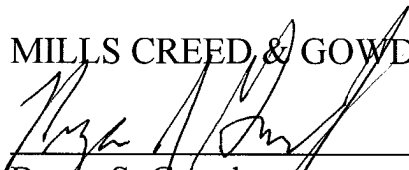
For example, in *Ross*, this Court issued a writ of habeas corpus to correct an illegal sentence. *Ross v. State*, 901 So. 2d 252, 252, 254 (Fla. 4th DCA 2005). The circuit court had denied the same claim in prior Rule 3.800 motions, and this Court had affirmed those rulings. *Id.* at 252-53. The circuit court had barred the

petitioner from further *pro se* filings. *Id.* Therefore, the Court resorted to the writ of habeas corpus apparently because it would have been futile for the *pro se* petitioner to file a Rule 3.800 motion in the circuit court. *See id.* As another example, this Court has granted habeas relief where it could not provide any other type of relief and where the failure to provide any relief would be a manifest injustice. *See Williams v. State*, 947 So. 2d 694, 694 (Fla. 4th DCA 2007) (providing habeas relief because the Court lacked the power to recall the mandate to correct the manifest injustice).

Under the circumstances of this case, a writ of habeas corpus is the only remedy available to correct the manifest injustice that Petitioner has suffered for the last seven plus years (and will continue to suffer) as a result of the circuit court's unlawful life sentence that it imposed in 1975. Filing a motion in the circuit court would be futile because, under the law of the case, the circuit court would be required to deny the motion. *See Lago*, 975 So. at 614. This Court, however, is not so constrained. *See id.* Accordingly, this Court should exercise its constitutional power and issue a writ of habeas corpus directing the Respondents to immediately release the Petitioner.

[COUNSEL'S SIGNATURE ON NEXT PAGE]

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CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing was furnished by U.S. Mail this 28 day of October, 2008, to the following:

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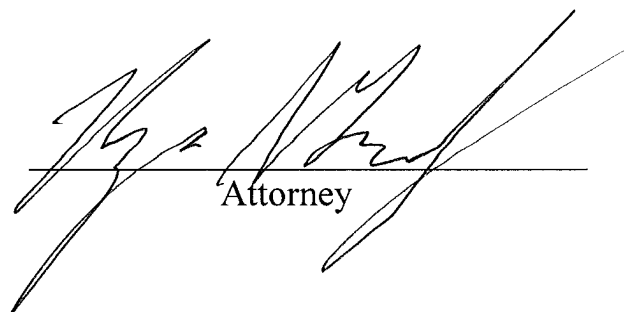
Honorable Cheryl J. Aleman
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Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition is in Times New Roman 14 point type and complies with the font requirements of Rule 9.100(*l*) of the Florida Rules of Appellate Procedure.



Attorney

OATH OF PETITIONER

Pursuant to section 92.525, Florida Statutes (2008), under penalties of perjury, I declare that I have read the foregoing Petition and that the facts stated in it are true.

David W. Griffin 10-16-08
DAVID W. GRIFFIN DATE