

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

STATE OF FLORIDA,

v.

Case No.: CR-O-2000-CF-02295-A
CR-O-1997-CF-12901-A

JOSEPH IVAN JENKINS,
Defendant.

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MOTION TO CORRECT ILLEGAL SENTENCE

COMES NOW, Jeffery L. Ashton, State Attorney for the Ninth Judicial Circuit of Florida and pursuant to Florida Rules of Criminal Procedure 3.800(a) and moves this Honorable Court to correct illegal sentence in the above-styled cause and as grounds there would state:

The Defendant was convicted on Violation of Probation in Case No. CR97-12901. The Defendant was sentenced on May 16, 2000 to 123.5 months Florida Department of Corrections with 523 days jail credit and run consecutive to CR00-2295. Also, the Defendant was convicted on First Degree Murder, Count 1; Count 2, Petit Theft; Count 3, Attempted Armed Robbery; and Count 4, Armed Burglary in case No. CR00-2295.

The Defendant was sentenced on May 16, 2000 in Count 1 to life imprisonment with credit for 1 year, 246 days jail credit run concurrent with each count and 3 years minimum/mandatory imposed for section 775.087(2) Florida Statute. Count 2, 60 days in Orange County jail with credit for 60 days time served. Count 3, 15 years Florida Department of

Corrections with credit for 1 year, 246 days jail credit run concurrent with each count and 3 years minimum/mandatory imposed for section 775.087(2) Florida Statute. Count 4, 30 years Florida Department of Corrections with credit for 1 year, 246 days jail credit run concurrent with each count and 4 years minimum/mandatory imposed for section 775.087(2) Florida Statute.

Prior to trial, the State Attorney's Office amended the Defendant's charge of Armed Burglary § 810.02(2)(B) to Burglary of an Occupied Dwelling § 810.02(3) and due to an error by an Assistant State Attorney, the "Amended" indictment and information was not filed with the clerk of the circuit court in which the defendant was tried and found guilty of Armed Burglary. The maximum statutory sentence is fifteen (15) years for Burglary. An accused offender cannot be indicted for one offense and convicted and sentenced for another, even though the offenses are closely related and for the same general nature or character and punishable by the same grade of punishment, See *Crumity v. State*, 922 So. 2d 276 (Fla. 4th DCA 2006).

The Defendant was tried by a jury and the court had instructed to the terms of First Degree Murder and lesser included offenses. On April 26, 2000, the jury found the defendant guilty on Count 4, Count 3 and the lesser included offenses in Count 2 and Count 1. The jury's verdict was guilty of Petit Theft § 810.014 on Count 2 and Third Degree Murder § 782.04(4) on Count 1. The court postponed sentencing until May 16, 2000, then sentenced the defendant to First Degree Murder based on the charged indictment. The defense counsel had objected to the judgment and sentence, but incorrectly classified the nature of the error. The court rejected the argument and reasoning at present, and denied the defense counsel's claims.

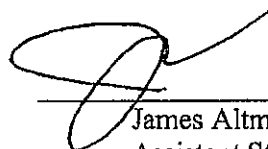
When evidence sustains only conviction of a lesser offense and the jury determines that

the evidence does not prove the offense for which the defendant was charged but does establish his guilt of a lesser statutory degree of the offense, or a lesser necessarily included in the offense charged, the court shall enter the judgment and the jury verdict to the judgment for the lesser degree of the offense or for the lesser included offense. See *Wilson v. State*, 680 So. 2d411 (Fla. 5th DCA 1996).

Also, the defendant was sentenced to Violation of Probation in another courtroom on May 16, 2000. The original charge indictment was Grand Theft of a motor vehicle, a third degree felony. The court revoked the probation and sentenced the defendant to 123.5 months imprisonment. The statutory maximum sentence that could be imposed for this charge of Grand Theft, a third degree felony is five (5) years imprisonment. Fla. Stat. 775.082. Where the sentence imposed exceeds the statutory maximum sentence for the crime charged is described as true illegal sentence as a matter of law. See *Nowlin v. State*, 639 So. 2d 1050 (Fla. 1st DCA 1994).

WHEREFORE, the state prays this Honorable Court will grant this Motion to Correct illegal Sentence and resentence the defendant under the sentencing guidelines.

Respectfully Submitted,



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JOSEPH IVAN JENKINS,
Defendant.

ORDER GRANTING MOTION TO CORRECT ILLEGAL SENTENCE

This Cause comes before this Court by and through Jeffery L. Ashton, State Attorney for the Ninth Judicial Circuit of Florida and pursuant to Florida Rules of Criminal Procedure 3.800(a) and moves this Court for an Order correcting the Defendant's illegal sentence. The Court being otherwise advised in the premises, reviewed record, and applicable Law this court finds the following:

1. **CR00-02295** The Defendant was convicted of First Degree Murder (Count 1); Count 2, Petit Theft; Count 3, Attempted Armed Robbery; and Count 4, Armed Burglary.

2. **CR97-12901** The Defendant was convicted of Violation of Probation.

In CR00-2295 Count 1: The Defendant was sentenced to life imprisonment with credit for 1 year, 246 days jail credit run concurrent with each count and 3 years minimum/mandatory. Count 2: 60 days in the Orange County jail with credit for 60 days time served. Count 3: 15 years Florida Department of Corrections with credit for 1 year, 246 days jail credit run

concurrent with each count and 3 years minimum/mandatory. Count 4: 30 years Florida Department of Corrections with credit for 1 year, 246 days jail credit run concurrent with each count and 3 years minimum/mandatory.

In CR97-12901, the Defendant was sentenced to 123.5 months Florida Department of Corrections with 523 days jail credit and run consecutive to CR00-2295.

In this instance, on CR00-2295 Count 1, the Court imposed life imprisonment on charges of First Degree Murder. The jury verdict found the Defendant guilty of a lesser included offense Third Degree Murder. When the court's written sentence which conflicts with an oral pronouncement of a sentence or jury verdict is an illegal sentence and a motion alleging such a discrepancy is cognizable in a Rule 3.800. *Wilkins v. State*, 543 So. 2d 800 (Fla. 5th DCA 2003).

In Count 4: The Defendant was wrongly convicted and sentenced for Armed Burglary 810.02(2)(B) Fla. Stat. When the charge indictment was for Burglary of an Occupied Dwelling 810.02(3) Fla. Stat. which the State properly concedes error. Where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment. The indictment or information may have alleged them in the conjunctive and proof of one would have sufficed. But if one of the statement of facts is alleged it cannot be established by proof of another. *Gaines v. State*, 652 So. 2d 458 (Fla. 4th DCA 1995).

In CR97-12901 the record indicates that the Defendant was convicted of Grand Theft of a motor vehicle, Fla. Stat. 812.014(2)(c)(6), a third degree felony. The Defendant was put on

A guidelines sentence which the incarcerative portion of the sentence and the probationary or community control period may not exceed the statutory maximum for the offense. *Garcia v. State*, 666 So. 2d 231 (Fla. 2d DCA 1995). Furthermore, a defendant cannot agree to a sentence that exceeds the statutory maximum.

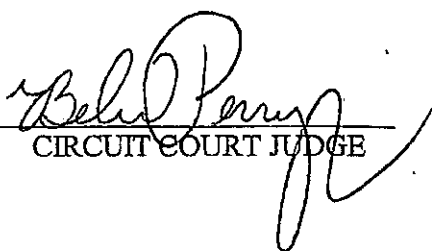
It is therefore, **ORDERED AND ADJUDGED** that the Defendant's Motion to Correct Illegal Sentence is **GRANTED** and the Defendant is sentenced to 15 years in Department of Corrections on Count 1 and Count 4 Case Number CR-O-2000-CF-02295 and awarded past jail and prison credit run concurrent with each count.

In Count 2 and Count 3, the Defendant's previously imposed sentences shall remain the same, except awarded past jail and past prison credit run concurrent with each count.

An additional the Defendant is sentenced to 5 years in the Florida Department of Corrections in Case Number CR-O-1997-CF-12901 and awarded past jail and past prison credit run concurrent with Case Number CR00-2295.

It is further **ORDERED** that the Clerk of the Circuit Court is directed to provide a certified copy of this order to the Florida Department of Corrections Bureau of Sentence Structure, 2601 Blairstone Road, Tallahassee, Florida 32399-2500.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 19th day of August 2013, *non pro tunc*, May 10, 2000.


CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have placed a true and correct copy of the foregoing has been furnished by U.S. Mail to Nicole L. Benjamin, Benjamin Law Group, 1516 E. Colonial Dr., Suite 110, Orlando, FL 32803 on this 19th day of Aug 2013.



JUDICIAL ASSISTANT