IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,711

THE STATE OF FLORIDA,

Petitioner,

vs.

EUSEBIO ACOSTA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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CITATIONS

PRELIMINARY STATEMENT

Petitioner was the Appellee in the District Court of Appeal, Fourth District, and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The Respondent was the Appellant in the Fourth District and the defendant in the trial court.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"PA"	Petitioner's Appendix

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on a question of great public importance certified by the Fourth District Court of Appeal which reversed Respondent's sentence as being illegal in violation of double jeopardy principles based on the following facts:

Respondent was charged in a two (2) count information with trafficking in cocaine and conspiracy to traffic in cocaine, each punishable by a mandatory minimum sentence of fifteen years (R.31,32,53). Respondent agreed to plead guilty to trafficking in cocaine in excess of four hundred grams and to render substantial assistance in the form of a full and truthful statement to the prosecutor as to the source of the cocaine. In exchange, the state agreed to request the trial court to reduce Respondent's sentence to seven years and to nol-pros the conspiracy count (R 34). Before accepting Respondent's pleas of guilty to Count I, trafficking in cocaine, the trial court advised Respondent:

> You're pleading guilty; you will be adjudicated guilty and sentenced to seven years imprisonment mandatory minimum, Florida State Department of Corrections, Special condition, that you give a statement to the Assistant State Attorney which will be given immediately upon conclusion here, to your satisfaction, Mr. McCully.[prosecutor]
>
> (R 4).

Thereafter, the prosecutor recited the factual basis for Respondent's guilty plea:

> The facts would show that on or about December 13, 1983, a detective named Sands met Mr. Estevez here in Broward County in a bar and a conversation was had between those two people that indicated somewhat his infatuation with her and eventually led to discussion about cocaine.
>
> There was later an introduction of a Mr. Estevez. When he introduced Miss Sands to the defendant, Acosta, on December 23rd, there were many telephone calls between the parties still with an idea towards the purchase by Detective Sands of a large quantity of cocaine.
>
> The facts would further show on December 30th, Detective Sands now in the company of Detective Futch, who is a male, met with Mr. Estevez who took them and introduced them to the defendant named Acosta. That meeting and discussions were about the purchase of cocaine transpired here in Broward County.
>
> Later that day Detective Sands, Detective Futch, Mr. Estevez, returned to Mr. Acosta's residence here in Broward County where Mr. Acosta directed Detective Futch to the location of a large quantity of cocaine in excess of 400 grams that was located behind a stereo speaker.
>
> As I recall Detective Futch weighed this cocaine in the presence of the other defendant, Estevez, and found it to be in excess of 400 grams. It has since been tested and found to be cocaine.
>
> Upon having retrieved that cocaine in having had all those discussions, all which occurred in Broward County, both defendants were arrested on that day.(R 6-7).

Defense counsel stipulated to the above-cited facts as being the factual basis for the plea (R 8).

After determining that there existed a factual basis for the plea and that the plea was knowingly, intelligently and voluntarily entered, the trial court adjudicated Respondent guilty of trafficking in cocaine and sentenced him to seven (7) years imprisonment with the condition he give a statement to the prosecutor pursuant to his substantial assistance agreement with the State (R 8). The State nol-prossed the conspiracy count (R 9).

Two days later, the Respondent pursuant to his agreement to provide substantial assistance in return for receiving a seven (7) year sentence on Count I and Count II being nol-prossed, gave the following statement to the prosecutor:

> At that time, I was working for Kentucky Fried Chicken. When I got off from work, around the Young Circle in Hollywood, I found a package with five pair of pants, $350, and the coke for which they arrested me.
>
> Because of my nee -- (R 51).

Thereafter, the State moved to set aside the plea, arguing that Respondent's statement did not comply with the "substantial assistance" requirement in Section 839.813, Florida Statutes (1983), and that Respondent was not entitled to a reduced sentence. The trial court granted the State's motion, entered a plea of not guilty on behalf of Respondent,

and set a trial date (R 25). Before trial, Respondent again pled guilty to trafficking in cocaine (R 29). The court accepted the plea and sentenced Respondent to a mandatory minimum of fifteen years imprisonment (R 34). Respondent appealed his sentence to the Fourth District Court of Appeal.

On April 9, 1986, the district court rendered its opinion in this cause, determing that Respondent's sentence was illegal in that it violated double jeopardy principles. The district court reversed the sentence based on the authority of its own decision in Cherry v. State, 439 So.2d 998 (Fla. 4th DCA 1983) and this Court's decision in Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). The district court recognized that its decision in the instant case as well as in Cherry, supra, conflicted with the decision of the second district in State ex. Rel. Miller v. Swanson, 411 So.2d 875 (Fla. 2d DCA 1982) and the fifth district's decision in Lerman v. Cornelius, 423 So.2d 437 (Fla. 5th DCA 1982) which both held that double jeopardy principles do not bar the reprosecution of a defendant who fails to comply with the terms of a negotiated plea agreement and who has already been sentenced, based on this Court's decision in Brown v. State, 367 So.2d 616 (Fla. 1979). The district court therefore certified the following question as one of great public importance:

> WHERE A DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA BARGAIN,

MAY A TRIAL COURT, AFTER SENTENCE HAS BEEN RENDERED AND THE DEFENDANT HAS BEGUN SERVING THAT SENTENCE, VACATE THE DEFENDANT'S PLEA AND INCREASE HIS SENTENCE?

Acosta v. State, 11 F.L.W. 840 (Fla. 4th DCA April 9, 1986).

POINT ON APPEAL

WHERE A DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA BARGAIN, MAY A TRIAL COURT, AFTER SENTENCE HAS BEEN RENDERED AND THE DEFENDANT HAS BEGUN SERVING THAT SENTENCE, VACATE THE DEFENDANT'S PLEA AND INCREASE HIS SENTENCE?

SUMMARY OF ARGUMENT

The Fourth District erred in reversing Respondent's sentence. The trial court properly vacated Respondent's negotiated conditional guilty plea and sentence since he failed to honor the only condition of that sentence by not giving the prosecutor a full and truthful statement as to the source of the cocaine. Although jeopardy had already attached at the time of Respondent's original sentencing, double jeopardy principles did not prevent the trial court from resentencing him after he failed to comply with the conditions of his negotiated guilty plea pursuant to this Court's decision in Brown v. State, supra.

ARGUMENT

WHERE A DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA AGREEMENT, A TRIAL COURT MAY PROPERLY VACATE BOTH THE DEFENDANT'S PLEA AND SENTENCE AND RESENTENCE THE DEFENDANT, AND SUCH RESENTENCING IS NOT ILLEGAL IN VIOLATION OF DOUBLE JEOPARDY PRINCIPLES.

The question certified by the Fourth District Court of Appeal should be answered by this Court in the affirmative. When a defendant fails to perform a condition of his plea agreement, it is not against double jeopardy principles for a trial court to vacate the defendant's plea and sentence, and to resentence him to an increased term of imprisonment. Petitioner submits that this Court's decision in Brown v. State, 367 So.2d 616 (Fla. 1979), as well as public policy, mandate that this question be answered in the affirmative.

In Brown, this Court held that double jeopardy does not bar the reprosecution of an accused who refuses to perform a condition of his guilty plea which has been accepted by the court on that basis. In Brown, the defendant had been indicted for first-degree murder but entered a negotiated plea of guilty to second-degree murder, which was accepted by the trial judge. A condition of the plea was that Brown aided the State in the prosecution of one of Brown's co-defendants. When Brown refused to testify at the co-defendant's trial the trial judge vacated the

negotiated plea and entered a plea of not guilty on behalf of Brown who stood mute. Brown was subsequently convicted at trial of first-degree murder. On appeal, Brown argued that his reprosecution violated double jeopardy principles and cited this Court's decision in Troupe v. Rowe, supra, in support of his argument. This Court however, rejected Brown's argument and held that although jeopardy had attached when the trial court accepted the negotiated conditional plea to second-degree murder, his reprosecution for first-degree murder was not barred since he failed to honor his plea argreement. Brown at 621. This Court specifically held:

> The basic framework in which plea bargains are currently viewed was stated by the United States Supreme Court in Santobello v. New York, 404 U.S. 257,261, 92 S.Ct. 495,498, 30 L.Ed.2d 427 (1971):
>
> > Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects

> of the guilty when they are ultimately imprisoned.

Both that Court and this have placed the plea bargaining process under close judicial scrutiny in a proceeding required to be conducted in public. These safeguards are superimposed in order to guarantee intelligent waiver of a defendant's rights to a jury trial, to confront the witnesses against him, to present witnesses in his own behalf, and to be convicted only upon proof beyond a reasonable doubt, all of which are relinquished in exchange (as it were) for the public's inability to incarcerate or fine the defendant to the full extent of the penalties assigned to the particular conduct by the public's elected representatives. Both values derive their legitimacy from "the public interest," as is recognized by the American Bar Association's Section of Criminal Justice and by this Court. Six specific considerations are listed by the American Bar Association as appropriate in determing whether a trial judge should accept concessions made by a prosecutor during the course of plea negotiations. The fifth of these is of particular relevance here:

> (5) that the defendant has given or offered cooperation has resulted in or may result in the successful prosecution of other offenders engaged in equally serious or more [sic] criminal conduct . . ..

Bargained guilty pleas, then, are in large part similar to a contract between society and an accused, entered into on the basis of a perceived "mutuality of advantage."

> Without commenting on the need or desirability of plea bargaining as a general matter, it is apparent what would follow from Brown's contention that the attachment of jeopardy mechanically bars subsequent prosecution. Both the state and criminal defendants would be discouraged from considering plea negotiations which contemplate the defendant's promise to testify in another case. The promise would be unenforceable by the state and therefore of little value to prosecutors. A defendant would be hesitant to enter into an agreement which required performance of this promise before he knew the bargain would be accepted by a judicial officer. Given the fact of negotiated please in our society, then, no "public interest" would be served by Brown's construction of the double jeopardy clause in conditional plea cases.
>
> [6] We hold, therefore, that the double jeopardy clause does not bar the reprosecution of an accused who willfully refuses to perform a condition of a guilty plea which has been accepted by the trial court on that basis. . (footnotes omitted)

Brown at 622-623.

It is thus clear that not only did the Brown Court reject Brown's argument it also rejected his reliance on Troupe v. Rowe, supra. The Brown Court specifically addressed negotiated plea agreements when it held that the double jeopardy clause does not bar the reprosecution of an accused who willfully refuses to perform a condition of a guilty plea which has been accepted by the court on that basis.

In applying the Brown decision, both the Second and Fifth District Courts of Appeal have held that double jeopardy principles do not bar the reprosecution of a defendant who fails to comply with the terms of a negotiated plea agreement and who has already been sentenced. In Miller v. Swanson, 411 So.2d 875 (Fla. 2d DCA 1981), the defendant was charged with first degree murder. The defendant and the State entered into an agreement whereby the defendant would receive a life sentence in exchange for a guilty plea to second degree murder. At the sentencing hearing, a different prosecutor was present other than the original prosecutor with whom the agreement was made. Without notification of the plea agreement by either party, the trial court sentenced the defendant to thirty years. The State filed a motion to correct the sentence. The trial court offered the defendant the opportunity to be resentenced in accordance with the original plea a withdraw the plea and stand trial on the first degree murder charge. When the defendant refused to accept either choice, the court vacated the plea. 411 So.2d at 876. Denying the defendant's writ of prohibition, the Second District held that although jeopardy had attached, and the defendant sentenced, the failure of the defendant to fulfill his plea bargain did not bar the defendant's reprosecution. Id. at 877. The Second District cited Brown as authority for its decision and

compared the defendant's failure to disclose the plea bargain to the trial court to the defendant's failure to testify in Brown. In both cases the defendants attempted to renege on the plea agreement by backing out of one of the specific conditions on which his agreement with the State was fashioned. Id. at 877. The Seond District also rejected the defendant's reliance on Troupe and stated:

> In Troupe, the trial judge withdrew a sentence already imposed after reconsidering a state objection to portions of the sentence. The trial judge had previously considered those objections and had agreed with the defendant's position when he entered the first sentence. In essence, the trial judge simply changed his mind. The Florida Supreme Court held that the trial judge was without authority to increase the sentence.
>
> Thus, in Troupe the trial judge changed his mind because he considered the state's original objection, and in Katz[1] the trial judge changed his mind because of new evidence. In neither of these cases was there a failure to carry out a part of the original plea agreement. In contrast, the case before us involves the imposition of a sentence directly contrary to the negotiated plea agreement.
>
> We find this case more closely akin to Brown v. State, 367 So.2d 616(Fla. 1979).

Miller at 876-877.

The Second District thus distinguished Troupe from Brown on the basis that Brown applied to situations where a defendant is reprosecuted because he has failed

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[1] Katz v. State, 335 So.2d 857 (Fla. 2d DCA 1976)

to honor a plea agreement. The Second District held that because the defendant had reneged on his plea agreement, he could be reprosecuted even though he had already been sentenced:

> Petitioner was contractually bound to the life sentence (without a minimum mandatory twenty-five years) once the state lived up to its end of the bargain by reducing the charge from first to second degree murder. At that point the state forfeited the possibility of capital punishment or the minimum mandatory twenty-five year sentence required to be served when a life sentence is imposed upon a conviction of first degree murder. The declared policy of this state is to encourage plea negotiations and agreements. Fla.R.Crim.P. 3.171(a). Numerous cases have held that a defendant may withdraw his plea where the facts establish that the prosecution has violated the terms and conditions of a plea agreement. We think that works both ways if the declared policy of rule 3.171(a) is to be effective. Otherwise, the state would be hesitant to enter into plea agreements with an accused if the state were subject to losing the benefit of the bargain. Our supreme court has noted that a bargained guilty plea is in large part similar to a contract between society and the accused, entered into on the basis of a perceived "mutuality of advantage." Brown v. State, 367 So.2d at 622. That was surely the case here.

Miller at 877.

In Lerman v. Cornelius, 423 So.2d 437(Fla. 5th DCA 1982), the Fifth District was faced with a similar factual scenario. In Lerman, the trial court sentenced the defendant in accordance with a plea agreement. Upon learning that the defendant had breached the terms of the agreement

the trial court entered an order vacating both the plea and sentence. The defendant sought prohibition on double jeopardy grounds. The Fifth District recognized that jeopardy had already attached but denied prohibition on the authority of Brown, and Miller. Both Lerman and Miller stand for the proposition that a defendant should not be able to benefit from his misrepresentations to a trial court pursuant to a plea agreement even if he has already been sentenced pursuant to that agreement.

Contrary to Brown, Lerman, and Miller, however, the Fourth District in the instant case held that even though Respondent totally failed to honor the only condition of his plea agreement, the trial court could not vacate his plea and sentence and resentence him. In the case sub judice, Respondent was charged in a two-count information with trafficking in cocaine and conspiracy to traffic in cocaine after he was arrested for selling an amount of cocaine in excess of 400 grams to undercover agents (R 53). Trafficking in cocaine and conspiracy to traffic in cocaine both carry a fifteen (15) year mandatory minimum sentence and a large fine upon conviction, as part of a negotiated plea agreement, Respondent pled guilty to trafficking and was sentenced to only seven (7) years in prison. The State nol-prossed the conspiracy count. In exchange for this, Respondent agreed to give a truthful statement to the prosecutors satisfaction regarding the Sourse of the

cocaine (R 4). Respondent's plea and sentence were clearly conditioned upon him giving the prosecutor a full and truthful statement (R 12). Two days after Respondent was sentenced and agreed to give a statement to the prosecutor pursuant to his substantial assistance agreement, Respondent told the prosecutor that he found the cocaine along with $350.00 and five (5) pair of pants in a package on Young Circle in Hollywood, Florida (R 51).

The trial court vacated Respondent's plea and sentence after Respondent failed to honor his negotiated plea agreement by not giving a full and truthful statement to the prosecutor's satisfaction (R 25). The court then entered a not guilty plea in behalf of Respondent and set the case for trial. Prior to trial, Respondent pled guilty and was sentenced to fifteen (15) years and appealed his sentence to the Fourth District. The Fourth District reversed Respondent's sentence as being illegal in violation of double jeopardy principles upon the authority of this Court's decision in Troupe and its own decision in Cherry v. State, 439 So.2d 992 (Fla. 4th DCA 1983). The Fourth District expressly rejected the State's argument that this Court's decision in Brown was controlling and distinguished Brown on the basis that it was only applicable in situations where sentencing had not yet occurred, whereas Troupe applied to situations where sentencing had occurred. The Fourth District recognized however, that it's decision conflicted with the

Second District's decision in Miller and the Fifth District's decision in Lerman, and certified the instant question.

Petitioner submits that the Fourth District's reliance on this Court's decision in Troupe and its own decision in Cherry, is totally misplaced and inappropriate given the above-cited facts. In Troupe, the defendant entered a voluntary plea of guilty, was sentenced and the hearing concluded. Shortly thereafter a second assistant state attorney intervened and objected to a portion of the defendant's sentence. The trail court then set aside the defendant's adjudication and sentence and stated that it was "arbitrarily on his behalf withdrawing his guilty plea... "Troupe at B59. This Court held that the trial court could not just "arbitrarily" withdraw the defendant's plea merely upon reconsidering a state objection to sentencing. This Court stated that jeopardy had attached and the sentence already imposed could not be increased pursuant to the State rearguing it's position since such would subject the defendant to double jeopardy. Troupe at 860.

The Fourth District cited Troupe in Cherry, when it held that after pronouncement of a legal sentence, a court cannot grant a subsequent motion to increase the sentence based on the belief that a mistake has occurred. In Cherry, the defendant rendered substantial assistance to the State and the State moved to reduce his sentence from fifteen (15) years to five (5) years with the possibility

of further reduction if the defendant rendered additional assistance. Cherry at 999. The trial court accepted the plea. The defendant at his sentencing hearing testified that he had made several unsuccessful attempts to render the additional assistance to police. The trial court, apparently sympathetic to these attempts, sentenced the defendant to three (3) years instead of the five (5) years previously discussed. One week later the State moved to correct the sentence. The court found that there had been an agreed upon plea which was contravened by his mistake, and granted the motion to set the sentence aside. The defendant was then sentenced to five (5) years. The Fourth District held that double jeopardy prohibited an increase in sentence where the trial court thought a "mistake" had been made in the original sentencing. It is important to note that neither Troupe nor Cherry involved a defendant whose plea and sentence had been vacated after he failed to honor the condition of a plea agreement. Rather, Troupe and Cherry involve situations where a trial judge vacates a plea and sentence "arbitrarily" or upon a "mistaken" belief that a sentencing error has occured. The defendants in those cases did not commit acts of commission or omission and did not breach plea agreements. Nevertheless, the Fourth District reversed Respondent's sentence upon the authority of Troupe and Cherry even though the instant case involves

a defendant who fails to honor the only condition of his plea agreement and is controlled by this Court's decision in Brown which states that double jeopardy does not bar the reprosecution of an accused who refuses to perform a condition of his plea agreement which has been accepted by the court on that basis.

Petitioner submits that the Fourth District's reliance on Troupe is totally misplaced. Troupe applies only to those situations where a defendant, through no fault of his own, has his plea and sentence arbitrarily or mistakenly vacated by the trial court. The reporsecution of such a defendant clearly violates double jeopardy principles as this Court has so stated. However, where a defendant fails to honor a condition of his negotiated plea agreement which has been accepted by the court on that basis, the court may properly vacate the defendant's plea and sentence and resentence him pursuant to this Court's decision in Brown. Contrary to the Fourth District's holding, these two (2) cases are distinguishable not because "they deal with different stages of a criminal proceeding, one prior to sentencing (Brown), and one after sentencing completed (Troupe)," but rather because one applies to plea bargains and the other does not.

Petitioner maintains the correctness of this Court's decision in Brown and its applicability to the instant case.

Where, as here, a defendant fails to honor the condition of his negotiated plea agreement which has been accepted by the Court on that basis, the court may properly vacate the defendant's plea and sentence and resentence him, and such resentencing does not violate double jeopardy principle. To hold otherwise, as the Fourth District did, is against public policy. The use of plea bargains in criminal cases had been approved by this Court and is an integral part of criminal law and sentencing. Brown v. State, 245 So.2d 41 (Fla. 1971). This Court has stated that bargained for guilty pleas, are in large part similar to a contract between society and an accused, entered into on the basis of a perceived "mutuality of advantage." Brown v. State, 367 So.2d 616 (Fla. 1979). This "contract" however, is a serious one and cannot be treated lightly. If the Fourth District's opinion is allowed to stand, it will undoubtedly discourage the State from entering into plea agreements with defendant's who are to render substantial assistance. Under the Fourth Districts opinion a defendant could promise anything in return for a lighter sentence and deliver absolutely nothing. The promise would be unenforceable by the State and therefore of little value to prosecutors who would undoubtedly be hesitant to engage in such "contracts". Given the fact of negotiated pleas in our society, then, no "public interest" would be served by the Fourth District's construction of the double jeopardy clause in conditional plea cases. Brown

at 622-623. Sentencing is not a game, and this Court should not allow it to turn into one by approving the Fourth District's decision. Farber v. State, 409 So.2d 71 (Fla. 1982). In order for plea agreements to be effective, the defendant, and not only the State, must be held to negotiate in good faith.

Petitioner submits that the Fourth District's decision should also be reversed on the ground that Respondent was well aware that his reduced sentence was dependent upon him giving a statement to the prosecutor regarding the source of the cocaine (R 4), and thus waived any double jeopardy claims when he told the court he would provide substantial assistance when in fact had no intention of doing so. In State v. Johnson, ___So.2d ___, 11 FLW 49 (Fla. February 6, 1986), the Supreme Court held that the right not to be placed twice in jeopardy is not waived by a defendant's failure to raise it before the trial court at the time he is again placed in jeopardy. However, the Court did caution that there may be instances in which a defendant may be found to have knowingly waived his double jeopardy rights. 11 FLW at 49. One of the cases cited by the Florida Supreme Court as an example was United States v. Pratt, 657 F.2d 218 (8th Cir. 1981). In Pratt, the federal court found a waiver of any claim that double jeopardy prohibited the imposition of consecutive sentences, by the defendant's statement during a plea colloquy that he under-

stood that consecutive sentences would be imposed.

Petitioner submits that similarly, Respondent's acceptance and understanding of the plea agreement: that his sentence was conditional upon him providing "substantial assistance in the identification, arrest or conviction of any of his accomplices, accessories, coconspirators or principals," §893.135(3), Fla.Stat., was a knowing waiver by Respondent of any double jeopardy claims. Respondent knew the condition of his sentence and Petitioner would submit that where the judicial act complained of is entirely consistent with what was intelligently agreed upon, double jeopardy is not a bar to resentencing. Rodriquez v. State, 441 So.2d 1129 (Fla. 3d DCA 1983).

Petitioner would further submit that because Respondent's light sentence was obtained by a fraudulent misrepresentation to the trial court, regarding his agreement to provide assistance when in fact he had no intention of so doing, his plea and sentence were void ab initio and the sentence illegal. In State v. Burton, 314 So.2d 136 (Fla. 1975), the Florida Supreme Court held that any order, judgment or decree which is obtained by fraudulent representations, whether in

a civil or criminal case, may be vacated, modified, opened or otherwise acted upon at any time. 314 So.2d at 137-138.[2] In negotiating a plea agreement with the State and in presenting the plea to the trial court for acceptance, a defendant and his counsel have a duty to answer truthfully all relevant inquiries made. Johnson v. State, 460 So.2d 954, 957 (Fla. 5th DCA 1984) affd State v. Johnson, ___ So.2d ___, 11 FLW 49 (Fla. February 6, 1986). Where, as here, a plea is conditional and qualified, the defendant's failure to perform the condition, provides legal cause to set aside the plea.

Petitioner thus maintains that the trial court correctly vacated Respondent's plea and sentence. Respondent clearly failed to honor the only condition of his negotiated plea agreement which was accepted by the court on that basis. His reprosecution does not violate double jeopardy principles and is consistent with this Court's holding in Brown.

Accordingly, the decision of the Fourth District must be reversed and the question certified, answered in the affirmative.

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[2] Actual knowledge of fraud is not necessarily for a finding of fraud. If a false representation of a material fact is made to a person ignorant thereof with the intention that it shall be acted upon, and the action and reliance thereon amounts to a substantial change in position, actionable fraud will be deemed to exist where (1) there is an implication by the positive character of the assertion that the representor had such knowledge, or (2) the representor makes the statement under circumstances where he should have known of the falsity. See, e.g., Joiner v. McCullors, 158 Fla. 562, 28 So.2d 823 (1947); Watson v. Jones, 41 Fla. 241, 25 So. 670 (1899).

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fourth District and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished by the United States Mail to: BRAVEMAN & HOLMES, 625 N.E. Third Avenue, Fort Lauderdale, Florida 33304, this 2nd day of June, 1986.

Carolyn V. McCann

Of Counsel