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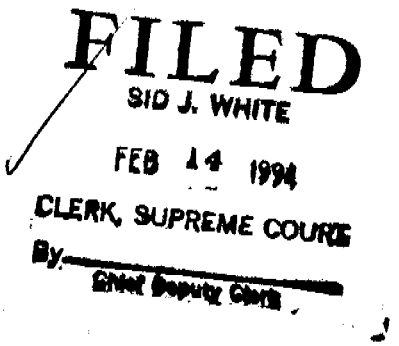
IN THE SUPREME COURT OF FLORIDA

CASE NO.83-013

District Court of Appeal
Third District-Case No.93-2146



FREDERICK E. MELVIN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

FREDERICK E. MELVIN, Pro-Se.
Glades Correctional Institution
500 Orange Avenue Circle
Belle Glade, Florida 33430

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BRIEF OF PETITIONER

INTRODUCTION

Petitioner, Frederick E. Melvin, was the appellant in the District Court of appeal, and the defendant in the trial court. Respondent the state of Florida, was the appellee in the District Court of appeal, and the prosecution in the trial court. This brief refers the parties as the state and the petitioner.

STATEMENT OF THE CASE AND FACTS

Petitioner, Frederick E. Melvin,is detained pursuant to a judgement and sentence imposed by the Eleventh Judicial Circuit, in and for Dade County, Florida. On January 22, 1990. Petitioner was arrested by the Florida City, police, and taken to the Florida City, police Department and some hours later

transported to Metro Dade police Headquarters where he was charged with Case No. 90-3133, with (I) count of second degree murder; (I) count of carrying a concealed firearm; (I) count of possession of a weapon while committing a felony. Then after being charged petitioner was transported to Dade County jail.

At the arraingment held on February 12, 1990. The State filed an information charging petitioner with (I) count of second degree murder with a firearm; count (II) unlawful possession of a firearm while engaged in a criminal offense. The Circuit Court appointed Mr. Henri Rauch, a Public Defender to represent petitioner in Case No. 90-3133; at the arraingment petitioner pleaed not guilty.

On March 23, 1990. Petitioner, went back to court and once in the courtroom petitioner was advised by the court and Mr. Robert S. Singer, that the court had appointed Mr. Singer, to represent petitioner in Case No. 90-3133; at which time petitioner asked Mr. Singer, what happen to Mr. Rauch, and Mr. Singer, respondent to petitioner with well Mr. Rauch, withdraw from the case because of some kind of conflict in the case, not knowing what the conflict was but,once petitioner was called by the court to the stand , the court advised petitioner and his court appointed counsel Mr. Singer, that the State was refiling an information charging petitioner with the following crimes: (I) count of attempted first degree murder with a firearm ; and count (II) unlawful possession of a firearm while engaged in a criminal offense in Case No. 89-46022.

On June 14, 1990, the State negotiated a plea bargin with petitioner based on the advice of petitioner court appointed counsel Mr. Singer. The State agreed to sentence petitioner to a term of thirty (30) years with a three year minimum mandatory for (I) count of second degree murder with

a firearm ;and count (II) unlawful possession of a firearm while engaged in a criminal offense in Case No. 90-3133, and (I) count of attempted first degree murder; and count (II) unlawful possession of a firearm while engaged in a criminal offense in Case No. 89-46022.Both cases 89-46022 and 90-3133 to run concurrent with eachother for an exchange for a no contest plea.

Petitioner did not take a direct appeal, but after various researching into petitioner's files and records regarding petitioner's case, petitioner discovered that his plea of no contest was entered involuntarily and without a full understanding of the consequences. Petitioner discovered as well that he was charged with two counts of unlawful possession of a firearm while engaged in a criminal offnese, which is in violation of the double jeopardy clause of the United States and State Constitution.

Petitioner also discovered that his court appointed counsel Mr. Singer, was Ineffective because he allowed petitioner to plea to two counts of possession of a firearm while engaged in a criminal offense, when these charges are a violation of the double jeopardy clause and petitioner counsel has a duty to properly inform petitioner about all charges and law.

On April 2, 1993, petitioner filed a Petition for Writ of Habeas Corpus pursuant to section 9.030, Fla. Rules. of App.P.; Article V. section 3;4;5; (B) Fla. State Constution. To the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. On July 22, 1993, said court denied petitioner's Petition for Writ of Habeas Corpus, treating it as a 3.850 motion.

On August 9th, 1993, Petitioner filed a Notice of Appeal to the Eleventh Judicial Circuit, in and for Dade County, Florida. On October 26, 1993, the District Court of Appeals Third District of Florida; PER CURIAM. Affirmed Petitioner's Notice of appeal on the authority of Novaton -V- State,610 So.2d 726 (Fla. 3d DCA 1992), review granted, Case No.81-183(Fla.July 14, 1993).

On October 29th, 1993, Petitioner filed a motion for certification to the Third District Court of Appeals, pursuant to Rule 9.330, Fla. Rules. of App. P. Moving the court for certification of a question of great public importance:

> " Does a Defendant, who "
> knowingly entered into
> a plea agreement, thereby
> waive an otherwise viable
> double jeopardy claim ?

And on December 14, 1993, the Third District Court of Appeal certified petitioner's motion for certification to the Supreme Court of Florida.

On January 3, 1994, Petitioner filed a Notice to invoke discretionary Jurisdiction to the District court of appeal Third District of Florida, pursuant to Rule 9.120 App. Procedure. On January 20, 1994, Petitioner received a order from the Supreme Court of Florida, postponing the decision on Jurisdiction and briefing schedule, filed January 18, 1994, advicing petitioner to file his brief on the merits on or before February 14, 1994. Petitioner brief on the merits are as follows:

QUESTION PRESENTED

WHETHER A PLEA OF GUILTY WAIVES THE DOUBLE JEOPARD VIOLATION OF IMPOSING MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE, WHERE THE VIOLATION IS APPARENT ON THE FACE OF THE RECORD.

DOES A DEFENDANT WHO KNOWINGLY ENTERED INTO A PLEA AGREEMENT, THEREBY WAIVE AN OTHERWISE VIABLE DOUBLE JEOPARDY CLAIM?

SUMMARY OF THE ARGUMENT

The trial Court, nither the defense Counsel, nor the State Attorney, advised petitioner of the maximum possible sentence taht he could be sentence to for each offense, nor did they inform him of the elements of the crimes which he was charged, whather the State had reasonable proof to obtain a conviction based on those elements at trial.By not doing these two things petitioner plea was not voluntary. See Exhibi "C".

The United States Supreme Court recognized plea bargaining as an essential component of the criminal justice system. When the government and a defendant agree to negotiate a plea, both parties must comply with Federal Rules of Criminal Procedure. Rule 11 (e).

In the State of Florida, before the court may accept a plea of guilty or nolo contedere, the trial judge must comply with Florida Criminal Procedure Rule 3.172 and the indicated subsection (c); 3.180 (c). (c)(i); (c)(iv); (c)(vii).

The three-core concerns underlying Rule 11, Federal Rule of Criminal Procedure, governing acceptance of guilty or nolo contendere plea, applicable to all States through the Fourteeth Amendment to the United States Constitution. As outlined by the State of Florida. (1) The plea must be voluntary; (2) The defedent must understand the nature of the charge and the consequences of his plea; and (3) There must be a factual basis for the plea. No plea of guilty or nolo contendere shall be accepted without first determining, in open court, with means or recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea, guilty or nolo contendere, Fla. Rules Crim. Proc. 3.170(j) 3.172(e)(f).

The trial judge must advise defendant of the maximum possible penalty for the crime; otherwise, the plea is void. West's F.S.A. Rules of Crim. Proc., Rule 3.172 (c)(i). The trial judge must advise defendant of the possible maximum mandatory penalty, if applicable, in order that a guilty or nolo contedere plea may be intelligently and voluntarily entered. The trial judge must advise defendant that without the expressed reseration of the right to appeal matters relating to the judgement. West's Rules of Crim. Proc. Rule 3.172(c)(vii); West's F.S.A. Sec. 924.06(3). Failure to so advise prohibits defendant from rendering a truly voluntarily and knowledgeable waiver of his constitution rights inherented in plea agreement.

No plea offer or negotiation is binding until it is accepted by the trial judge, formally, after making all necessary inquiries, advisements and determinations required by law. Until that time, it may be withdrawn by either party without any necessary justification. West F.S.A. Rules of Crim. Proc. Rule 3.172(f).

The court failure to address any one of these three core concerns shall constitute an automatic reversal, Federal Rules of Crim. Proc. Rule 11, 18 U.S.C.A., U.S. v. Bell, 776 F.2d 965, rehearing, denied 782 F.2d 180. Cert. denied 106 S.Ct. 3272, 477 U.S. 904 (11th Cir.).

In the case at bar the trial court, defense counsel, and the state attorney failed to advise petitioner of the maximum possible sentence that he could be sentenced to for each offense. Accordingly, petitioner plea should be withdrawn.

II.

The trial court erred in entering convictions for both second degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense, when both charges are in violation of the double jeopardy clause of the United States and State's Constitution. The trial court also erred in entering convictions for both attempted first degree murder with a firearm and unlawful

possession of a firearm while engaged in a criminal offense, which is also in violation of the United State and State's Constitutution. See exhibit "A" and "B".

it is a violation of the double jeopardy clause of the United States Constitution and Florida State Constitution to charge petitioner with the two counts of unlawful possession of a firearm while engaged in criminal offense, and both of these charges must be vacated in light of law and facts of these cases. See Cleveland v. State, 587 So.2d 1145, and Standley v. State, 560 So.2d 1269.

III.

Petitioner court appointed counsel was ineffective because he allowed petitioner to plea no contest to two counts of possession of afirearm while engaged in a criminal offense, when these charges are a violation of the double jeopardy clause and counsel has a duty to properly inform petitioner of all charges and law.

Counsel allowed petitioner to plea no contest without first telling him the maximum sentence he could receive for each charge, and also counsel failed to inform petitioner of all the elements that the state must prove beyond a reasonable doubt as to each charge.

Counsel failed to file a motion to dismiss the two counts of possession of a firearm while engaged in criminal offense, when both of these charges are a violation of petitioner Federal and State constitutional rights, these charges violate the double jeopardy clause of the State and Federal Constitution.

Effectiveness of counsel is not tested merely by counsel's performance in the court room but must be also measured by attorney's familiarity of facts and law of case.

In the case at bar, reasonably effectiveness assistance of counsel claims require a two-prong showing. Under the first part of the Strickland v. Washington,

466 U.S. (1984) test "the performance inquiry must be whether counsel's assistance was reasonably considering all the circumstances. " 466 U.S. at 688. Therefore, petitioner has shown (4) prongs in light of counsel's unprofessional conduct and petitioner's plea should be withdrawn.

(IV)

A plea of guilty does not waive constitutional claims, such as claims of double jeopardy, which affect the court's power to adjudicate and sentence. What the plea waives is the defendant's right to present supplemental evidence to demonstrate the claim. When a double jeopardy violation is apparent on the face of the record existing at the time of the plea, it is not waived by the entry of the plea, and may be challenged on appeal. Such patent double jeopardy violations, if waiveable at all, must be affirmatively waived. This case involves a patent violtion of the guarantee against multiple punishments for the same offense imposed in a single proceeding by its very nature, that aspect of the double jeopardy guarantee is not susceptible to waiver. The power to prescribe penalties for crimes depends entirely on legislative authorization, and where that authorization is absent, it cannot be conferred by the parties. In this context, the purpose of the double jeopardy clause is to ensure that sentencing court's do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishment. This aspect of the clause is jurisdictional, not personal, and cannot be bargained away.

The factual predicate needed to impose a particular sentence, a predicate which the state would otherwise be required to prove, can be waived by the defendant, just as he can waive the state's burden of proving his guilt.

But neither the defendant nor the state can create new sentencing alternatives, or extend the sentencing limits prescribed by the legislature, or confer upon the court the authority to do either of these things. The double jeopardy clause guarantees that this allocation of authority will not be evaded by doing indirectly what cannot be done directly.

The Florida legislature has manifested the intent that convictions not be entered when a separate sentence based on that conviction is not authorized, Moreover, in Florida, convictions have sentencing effects, even when they are not themselves the basis for a sentence. Accordingly, both convictions and sentences must be treated as punishments for double jeopardy purposes, and since the multiplicity is equally unauthorized, neither the illegality of multiple convictions nor the illegality of multiple sentences is waived by the entry of a guilty plea.

In this case, it is apparent from the record made at the time of the plea that the convictions and sentences for the two counts possession of a firearm while engaged in a criminal offense are barred by the double jeopardy principles enunciated by this Court in Cleveland -V- State, 587 So.2d 1145(Fla. 1991). Even if such a violation were waivable, in this case, it was not expressly and affirmatively waived. To the contrary, it is obvious from the record that the impermissibly cumulative character of these convictions and sentencee was not even noticed at the time of the plea. Frederick E. Melvin, agreed to the convictions and sentences, but never expressly waived the double jeopardy violtion. Accordingly, those convictions and sentences must be vacated.

ARGUMENT

I.

PETITIONER ALLEGES THAT HIS PLEA OF NO CONTEST WAS NOT ENTERED VOLUNTARILY AND WITH A FULL UNDERSTANDING OF THE CONSEQUENCES.

The United States Supreme Court recognized plea bargaining as an essential component of the criminal justice system. Blackedge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 260 (1941). When the government and a defendant agree to negotiate a plea, both parties must comply with the Federal Rules of Criminal Procedure. Rule 11(e).

In the State of Florida, before the court may accept a plea of guilty or nolo contendere, the trial judge must comply with Florida Rule of Criminal Procedure Rule 3.172 and the indicated subsections whichstates:

> (c) Except where a defendant is not present for a plea, pursuant to the provision of rule 3.180 (c). The trial Judge should, when determining voluntariness, place the defendant under oath, and shall address him personally to determine that he understand:
>
> (c) (i) The nature of the charge to which is offered, the mandatory minimum penalty by law, if any, and the maximum possible penalty provieded by law; and
>
> (c) (iv) That the defendant pleads guilty or nolo contendere without expressed reservation of the right to appeal all matters relating to the judgement, including the issue of guilty or innocence; and
>
> (c) (vii) The complete terms of the plea agreement, including specifically all ob-

-ligations defendant
will incur as a result.

The three-core concern underlying Rule 11, Federal Rules of Criminal Procedure, governing acceptance of guilty or nolo contendere plea, applicable to all states through the Fourteeth Amendment to the United States Constitution. U.S. -V- Bell, 776 F.2d 965, rehearing denied, 782 F.2d 180, cert. denied, 106 S.Ct. 3272, 477 U.S. 904 (11th Cir. 1985). As outlined by the State of Florida. (1) The plea must be voluntary; (2) The defendant must understand the nature of the charge and the consequences of his plea; and (3) There must be a factal basis for the plea. William v. State, 316 So.2d 267 (Fla.1975); incorporated into Florida Rules of Criminal Procedure 3.172, Id. at 343 So.2d 1247 (Fla.1977).

No plea of guilty or nolo contendere shall be accepted without first determinining, in poen court, with means of recording the proceedings stenogra-phically, or by mechaniacl means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea, guilty or nolo contendere, Fla. Rules. Crim. Proc. 3.170 (j) 3.172 (e), (f). Harden v. State, 453 So.2d 31 at 32-33 (Fla. 1st DCA 1987), and Koenig v. State, 597 So.2d 256 (Fla. 1992).

The trial judge must advise defendant of the maximum possible penalty for the crime; otherwise, the plea is void. West's F.S.A. Rules of Crim. Proc., Rule 3.172 (c) (i). Gaza v. State, 519 So.2d 727 (Fla. 2d DCA 1988); Blackshear v. State, 455 So.2d 555 (Fla. 1st DCA 1984); State v. Coban, 520 So.2d 40 (Fla. 1988); U.S. v. Stizer, 785 F.2d 1506 (11th Cir. 1986), cert. denied, Perna v. U.S., 107 S. Ct. 479 U.S. 823 ; Henderson v. Morgan, 426 U.S. 637 (1976);

Smith v. O'Grady , 312 U.S. 329 (1941); Gaddy v. Linahan, 780 F.2d 935 (11th Cir. 1986); LoConte v. Dugger, 847 F.2d 745 (11th Cir.), cert. denied, U.S. 109 S.Ct. 397 (1988); Gaddy, Supra, at 1786-87. Lott v. United States, 367 U.S 421 (1961); United States v. American Service Corp, 580 F.2d 823 (5th Cir.) ; cert. denied, 439 U.S. 1071 (1979). cf. Gaddy, supra, at 1789.

The trial judge must advise defendant of the possible minimum mandatory penalty, if applicable, in order that a guilty or nolo contendere plea may be intelligently and voluntarily entered. West's F.S.A. Rules of Crim. Proc., Rule 3.172 (c) (i). Perez v. State, 449 So. 2d 407 (Fla. 2d DCA 1984); Vann v. State, 366 So.2d 1241 (Fla. 3d DCA 1979); Green v. State, 406 So.2d 1148 (Fla. 1st DCA 1981), approved 421 So.2d 508 (Fla.1982); Garza v. State, 519 So.2d 727 (Fla. 2d DCA'1988).

The trial judge must advise defendant that without the expressed reseration of the right to appeal matters relating to the judgement. West's Rules of Crim. Proc., Rule 3.172 (c) (vii); West's F.S.A., sec. 924.06(3). Santos v. State, 380 So.2d 1284 (Fla. 1980).

Failure to so advise porhibits defendant from rendering a truely voluntary and knowledgable waiver of his constitutional rights inherented in the plea arrangment, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709(1969); Brady v. U.S., 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed. 2d 747 (1970).

No plea offer or negotiation is binding until it is accepted by the trial judge, formally, after making all necessary inquiries, advisements and determinations required by law. Until that time, it may be withdrawn by either party without any necessary justification. West's F.S.A. Rules of Crim. Proc. Rule 3.172 (f). Howard v. State, 516 So.2d 31 at 32-33 (Fla. 1st DCA 1987);

Harden v. State, 453 So.2d 550 (Fla. 4th DCA 1984).

The court's failure to address any one of these three core concerns shall constitute an automatic reversal, Federal Rules of Crim. Proc. Rule 11, 18 U.S.C.A., U.S. v. Bell, 776 F.2d 965, rehearing denied 782 F.2d 180. cert. denied 106 S.Ct. 3272, 477 U.S. 904 (11th Cir.).

Point (I) : In the case at bar nither the trial court, nor defense counsel, nor the state attorney, advised petitioner of the maximum possible sentence that he could be sentenced to for each offense, nor did they inform petitioner of the elements of the crimes with which he was charged, whather the facts of his case fits those elements, or whather the state had reasonable proof to obtain a conviction based on those elements at trial. By not doing these two things petitioner plea was not voluntary. See U.S. v. Bell, 776 F.2d 965; Henderson v. Morgan, 426 U.S. 637; Smith v. O'Grady, 312 U.S. 329, and Gaddy v. Linahan, 780 F.2d 935). See exhibit "C".

Point (II): The trial court, the state attorney, and defense counsel allowed petitioner to plead a no contest plea to two counts of unlawful possession of a firearm while engaged in a criminal offense which is in violation of the double jeopardy clause of the United States Constitution. and Florida State Constitution. Petitioner, was not fully advised and his plea is null and void Ab initio. A defendant cannot be allowed by the court to plead guilty or nolo contendere to any charge that is illegally placed against him, and it is the trial Judge's duty to protect the defendant rights. See exhibit "A" "B" and "C".

(II)

PETITIONER ALLEGES THAT HE WAS CHARGED WITH TWO COUNTS OF UNLAWFUL POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE U.S. AND STATE CONSTITUTION.

" The trial court erred in entering convictions for both Second degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense". Stanley v. State, 560 So.2d 1269 (Fla. 3 DCA 1990); Cleveland v. State, 587 So.2d 1145 (1991); Hall v. State, 517 So.2d 678 (Fla. 1988); Caravan v. State, 515 So.2d 161 (Fla. 1987); Davis v. State, Case No. 90-2443 (Fla. 3 DCA December, 1991); Young v. State, Case No. 91-184, 17 F.L.W. (D) 846 3d Dist. Opinion filed March 31, 1992).

In Gonzalez v. State, 543 So.2d 386 " The court vacated the defendant's conviction of unlawful possession of a firearm while engaged in a criminal offense, 790.07, Fla.State. 1985; as violative of the double jeopardy provision of the State and Federal Constitution because he has also been charged and convicted of first degree murder with a firearm for the same offenses" Caravan v. State, 515 So.2d 161 (Fla. 1987); Mozqueda v. State,541 So.2d 777 (Fla. 3 DCA 1989); Tunidor v. State, 541 So.2d 165 (Fla. 3 DCA 1989); Smith v. State, 539 So.2d 601 (Fla. 3 DCA 1989); Henderson v. State, 526 So.2d 743 (Fla. 3 DCA 1988); contra. Harper v. State, 537 So.2d 1131 (Fla. 1 DCA 1989).

(III)

INEFFECTIVE ASSISTANCE OF COUNSEL.

(A) Counsel allowed petitioner to plea to two counts of possession of a firearm while engaged in a criminal offense. These charges are a violation of the double jeopardy clause and counsel has a duty to properly inform petitioner about all charges and law.

(B) Counsel allowed petitioner to plea no contest without first telling him the maximum sentence he could receive for each charge and also counsel failed to inform petitioner of all the elements that the state must prove behond a reasonalbe doubt as to each charge.

(C) Counsel failed to file a motion to dismiss the two counts of possession of a firearm while engaged in criminal offense, when both of these charges are a violation of this petitioner's Federal and State Constitutional rights, these charges violate the double jeopardy clause of the State and Federal Constitution.

(1) Effectiveness of counsel is not tested merely by counsel's performance in the courtroom but must also be measured by attorney's familiarity with facts and law of case. Hollingshead v. Wainwright, 423 F.2d 1059.

On March 23, 1990, petitioner appeared before the Court with court appointed counsel Mr. Henri Racuh, who negotiated a plea of 15 years with the State. However, when petitioner arriv ed in the court room he was met by Mr. Robert S. Singer. At that

point Mr. Singer along with the court advised petitioner that Mr. Rauch had withdraw from his case because there was a conflict of interest. But, petitioner was never advised as to what the conflict actual was. Mr. Singer further advised petitioner that he knew of the Fifteen year deal that Racuh had made with the State, but advised petitioner that the fifteen years were no longer available to him and if he wish to plea the offer was 30 years, simply because of the conflict of interest. During this point petitioner was further advised by the court that the State was refiling an information in case no: 89-46022, once the information was filed petitioner was returned back to the County jail to await trial. Two months later, Mr. Singer appeared at the County jail and advised petitioner that he could not pervail at a jury trial. Mr. Singer again advised petitioner that the state's offer was 30 years with a 3 year Minimum Mandatory and that if he did not accept the offer the State would up grade the charge from second degree murder to first degree murder with the State's right to seek the imposition of the death penalty. Petitioner's counsel further stated that it would be in his best interest to accept the 30 years and to resolve this matter in an expedient fashion. Petitioner then told Mr. Singer that if he felt that strongly as to petitioner's guilt or innocence he should withdraw from the case. In response to petitioner's request counsel stated that the " Judge would not let him withdraw " from the case. That because of continuing inducement by counsel and the State, Petitioner finally gave in. Counsel error was further compounded where he permitted petitioner to plead no

contest to two counts of unlawful possession of a firearm while engaged in a criminal offense. Counsel's advise was not an informed choice, because both charges are in violation of the double jeopardy clause both State and Federal Constitutions. See Cleveland v. State, 587 So.2d 1145 (Fla. 1991).

In the case at bar reasonably effective assistance of counsel claims requires a two-pron showing. Under the first part of the Strickland v. Washington, 466 U.S. 668 (1984) test " the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. As a corollary, the appropriate standard for evaluating counsel's pretrial investigations is " reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgement. " 466 U.S. at 691, Chatom v. White, 858 F.2d 1479 at 1485 (11 Cir. 1988). "(Counsel's representation must be shown to be below an objective standard of reasonableness.)" The court also noted that an attorney has an obligation " to consult with his client on important decisions and to keep his client informed of important developments in the course of the prosecution." (j)udicial scrutiny of counsel's performance must be highly deferential, " and that courts should make certain " that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

In order to succeed on an ineffective assistance of counsel

Claim, petitioner must surmount" a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Overcoming the first part of the Strickland test does not guarantee relief. Regarding the second part of the test, the court has recognized that " (a)n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment." Moreover, Hill v. Lockhart, 474 U.S. 52 at 58 (1985); clarified the Strickland second or " prejudice must show that there is a reasonable probability that, but for counsel's error, he would not have pleaded no contest and would insisted on going to trial."

The essence of petitioner's argument is that, his no contest plea was not entered knowingly, voluntarily and intelligently, for counsel had a duty owed to defendant in " investigating and evaluating his options in the course of the proceedings and then to advise petitioner as to the merits of each. " In the present case counsel permitted petitioner to plead no contest to the above mentioned charges in violation of petitioner's fifth amendment right to be put twice in jeopardy for the same offense. In addition, Mr. Singer also permitted petitioner to plea no-contest without first advising him of the maximum possible penalty provided by law, nor did counsel inform petitioner of the elements of the crimes with which he was charged, whether the facts of his case fits those elements, or whether the state had reasonable proof to obtain a conviction based on those elements at trial.

For it is counsel's duty to ascertain if the plea is entered voluntarily and knowingly. Lamb v. Beto, 423 F.2d 85 at 87 (5 Cir. 1970). In sum, counsel should have been aware that petitioner was pleading no contest to double jeopardy charges, thereby rendering his services ineffective. Had counsel provided petitioner with the proper understanding of the law the end results would have been different. Therefore, had counsel investigated these cases properly he would have learned that both counts were in violation of the double jeopardy clause. Counsel's failure to file a motion to dismiss the above mention charges renders counsel's performance to be below the objective standard of reasonableness. Therefore, in light of counsel's unprofessional conduct petitioner's plea should be withdrawn.

IV.

A PLEA OF GUILTY DOES NOT WAIVE THE DOUBLE JEOPARDY VIOLATION OF IMPOSING MULITIPLE PUNISHMENTS FOR THE SAME OFFENSE, WHERE THE VIOLATION IS APPARENT ON THE FACE OF THE RECORD.

The double jeopardy clause of the fifth amendment to the United States Constitution, and of Article 1, section 9, of the Florida Constitution, protects against multiple punishments for the same offense. As the State and the district court of appeal acknowledged, this case presents a patent violation of that constitutional guarantee. The petitioner, Frederick E. Melvin, entered into a negotiated plea agreement with the State, under which he would plead no contest to the several offenses charged in two separate informations, and would be sentenced to concurrent terms totaling (30) years in prison, subject to a three year minimum mandatory requirement. The convictions and sentences for the two counts of possession of a firearm while engaged in a criminal offense would normally be barred by the the double jeopardy principles enunciated by this court in Cleveland v. State, 587 So.2d 1145 (Fla. 1991). The district court of appeal held, however, that the negotiated plea of guilty constituted a waiver of the right to challenge the double jeopardy violation.The case before this Court to resolve the conflict between that decision and decisions of the Second and Fourth District Courts of Appeal, which hold that a guilty plea does not waive the right to challenge the illegality of entering a conviction or imposing a sentence that is barred by the double jeopardy clause.

As set forth below, a plea does not waive constitutional claims which affect the court's power to adjudicate and sentence. All double

jeopardy claims are " jurisdictional " in this sense, and when apparent on the face of the record are not waived by the entry of a plea. If waivable at all, such claims must be affirmatively waived. Moreover, the power to impose cumulative punishments depends entirely on legislative authorization, and where that authorization is absent, it cannot be conferred by the parties. Accordingly, apparent **Cleveland**-type violation are not waivable, and even if they were, in this case, the violation was not expressly and affirmatively waived.

Plea of Guilty as Waiver of Constitutional Claims:

A knowing and voluntary plea of guilty removes the issue of a defendant's guilt from the case. **See Robinson v. State, 373 So.2d 898, 901-2 (Fla. 1979).** A guilty plea " is more than a confession which admits that the accused did various acts. " **Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 223 L.Ed. 2d 274 (1969).** It is an " admission that he committed the crime charged against him. " **North Carlina v. Alford, 400 U.S. 25, 32, 92 S.Ct. 160, 164, 27 L.Ed. 2d 162 (1970).** Accordingly, as a general rule, such a plea bars the defendant from subsequently challenging alleged constitutional deprivations that occurred prior to the plea **Tollet v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed. 2d 235 (1973); Robinson at 902.** The only points available for an appeal concern actions which took place contemporaneously with the plea. **Robinson, 373 So.2d at 902; See also Tollett, 411 U.S. at 267, 93 S.Ct. at 1608 (explaining the rule in the context of Federal collateral attack to conviction based on guilty plea).**[2]

[2] The rule codified in the Florida Statutes and rules governing appeals by defendants in criminal cases. See Robinson, 373 So.2d at 902. The same rule applies to pleas of nolo contendere entered without reservation of the right to appeal. See Peel v. State, 150 So.2d 281 (Fla. 2d DCA 1963).

However, " [t]here are exceptions where on the face of the record the court had no power to entere the conviction or impose the sentence. " **United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed. 2d 927 (1989).** Constitutional violations are not waived by a guilty plea. **See Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974); Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed 2d 195 (1975); United States v. Cortez, 973 F.2d 764, 767 (9th Cir. 1992)(a guilty plea " removes the question of the defendant's guilt from the case, [but] the issue of whether the government had the power to bring the charge at all still remains ").** Because such claims challenge the court 's authority to enter the conviction or imposed the sentence they are referred to as " jurisdiction. " **See Cortez, 973 F. 2d at 767.**

In Florida, The " jurisdictional defects," **Briges v. State, 376 So. 2d 233, 233-34 (Fla. 1979),** which may be reviewed despite the entry of a guilty plea includes the lack of subject matter jurisdiction, the failure of the charging instrument to charge an offense, and the illegality of the sentence, **see Bridges, at 234; Robinson at 902.**[3] Double jeopardy claims may also fall into this category, **see, e.g., State v. Johnson, 483 So.2d 420 (Fla. 1986); Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991); Kurtz v. State, 564 So.2d 519 (Fla. 2d DCA 1990); Robbins v. State, 413 So.2d 840 (Fla. 3d DCA 1982),** but, as

[3] **Challenges to the knowing and voluntary character of the plea, and claims that the prosecution failed to abide by the plea agreement, which present disputed issues of fact, must first be presented to the trial court. See Robinson, 373 So.2d at 902.**

the present case indicates, the Florida Courts are not of one mind in this regard.

In the federal courts, the " jurisdictional claims " which have been recognized include claims of double jeopardy, claims that the statute is facially unconstitutional, claims that the indictment failed to state a claim, and claims of vindictive prosecution. **See Cortez, 973 F.2d at 767 (listing the " jurisdictional claims " and citing cases).**

The right to raise such claims despite a plea of guilty is limited, at least in the federal courts, by the requirement that the claim must be apparent from the face of the indictment or record existing at the time of the plea. If supplemental evidence is required, the claim is barred. **Broce, 488 U.S. at 571, 576; 109 S.Ct at 763, 766; United States v. Pollen, 978 F.2d 78, 84 (3rd Cir. 1992)(Broce establishes the principle that a defendant who pleas guilty to a criminal charge may subsequently assert a claim of multiple punishment in violation of the double jeopardy clause only if the violation is apparent on the face of the indictment or record), cert denied, ___U.S.___, 113 S.Ct. 2332 (1993); Taylor v. Whitley, 933 F.2d 325, 328 (5th Cir. 1990) (Same); United States v. Quinones, 906 F.2d 924, 927 (2d Cir. 1990) (" the test that apparently emerges from Broce seems to turn on whether the claim of double jeopardy may be adjudicated on the face of the record or requires supplement evidence"), cert denied, ___U.S. ___, 111 S.Ct 789, 112 L.Ed. 2d 851 (1991).**

In other words, what the guilty plea waives is the defendant's right to make evidentiary showing needed to demonstrate the violation,

and which he neglected to make below, when he had the opportunity to do so. **Broce, 488 U.S. at 571, 573-74, 575-76, 109 S.Ct. at 763, 764, 765-66.** The plea does not cut off the right to argue the illegality which is apparent on the face of the record. **See Taylor, 933 F.2d at 328 -29. See also Menna, 423 U.S. at 63 n. 2, 96 S.Ct. at 242 n. (" a plea of guilty to a charge does not wavie a claim that---judged on its face-the charge is one which the State may not constitutionally prosecute").**[4]

Plea of Guilty as Waiver of Double Jeopardy Claim:

The guarantee against double jeopardy " Has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. **North Carolina v. Pearce, 395 U.S. 711,717, 89 S.Ct. 2072,2076, 23 L.Ed. 2d 656 (1969).**

Because courts lack the authority to enter a conviction or impose a sentence in violation of the double jeopardy clause, a deprivation of any of the three protections guaranteed by the clause presents a " jurisdictional " claim " which, if apparent from the face of the record, may be raised in the federal courts, even when the conviction and sentence resulted from a guilty plea. **See Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); United States v. Kaiser, 893**

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4. **The case of Dermota v. United States, 895 F.2d 1324 (11th Cir. 1990), upon which the district court of appeal relied in this case, is not to the contrary. In Dermota, as in Broce, the defendant plead guilty to counts of an indictment that, on its face, described separate offenses. He subsequently sought to prove that the offenses were in fact a single offense. The Circuit Court of Appeals held, following Broce, that he had waived the opportunity to raise that claim.**

F.2d 1300, 1302 (11th Cir. 1990); United States v. Pollen, 978 F.2d 78, 84 (3rd Cir. 1992). The right to challenge an apparent violation of the prohibition against multiple punishments for same offense imposed in a single proceeding was specifically recognized in Kaiser, and Pollen and implicitly in Broce.

Certain double jeopardy protections, such as the protection afforded to a defendant's expectations of finality, may be waivable. See Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed. 2d 1 (1987)(defendant's breach of plea agreement by refusing to testify at codefendant's trial removed double jeopardy bar to prosecution of defendant on original charges where plea agreement provided that if defendant refuded to testify, entire agreement under which he plead to reduced charge would be void and original charge automatically reinstated); Goene v. State, 577 So.2d 1306 (Fla. 1991)(defendant's affirmative misrepresentation of proir record at time of sentencing removed double jeopardy bar to later imposition of correct sentence).

However, none of the double jeopardy protections are waived by the mere entry of a plea, if the violation is apparent of the record. See Menna; Kaiser; Pollen. See State v. Johnson, 483 So.2d 420, 422-23 (Fla. 1986)(" The failure to timely raise a double jeopardy claim does not in and of itself, serve as a waiver of the claim, " and " the law is clear that the claim of double jeopardy may be raised in a post-conviction relief proceeding after the second conviction, even when that conviction is the result of aguilty plea "). Patent violations of those protections must be affirmatively waived. See State v. Johnson, 483 So.2d 420,422-23 (Fla.1986); Taylor, 933 F.2d at 330 (" A

defendant who enters a guilty plea despite indictments or a trial court record that evince on their face a double jeopardy violation must expressly relinquish his right against double jeopardy; otherwise, he has not waived his right to challenge the double jeopardy'). See also Pollen (where waiver was not found even though the defendant entered a negotiated plea).

A Cleveland Violation is not Waivable:

This case involves a patent violation of the guarantee against multiple punishments for the same offense impiosed in a single proceeding. While all three of the double jeopardy protections have " obvious jurisdictional overtones, " **People v. Michael, 394 N.E. 2d 1134 (N.Y. 1979),** that jurisdictional character is particularly obvious with respect to this aspect of the double jeopardy clause. By its very nature, the protection againt multiple punishments for the same offense imposed in a single proceeding is not susceptible to waiver. This aspect of the double jeopardy clause is jurisdictional, not personal , and cannot be bargained away.

The power to prescribe penalities for crime rests with the legislature, not with the courts, and where the requisite legislative authorization is absent it cannot be conferred by the parties. **E.g. Larson v. State, 572 So.2d 1368, 1371 (Fla. 1991); Williams v. State, 500 So.2d 501, 503 (Fla. 1986, receded from on other grounds in Quarterman v. State, 527 So.2d 1380 (Fla. 1988); Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943).**

In this context, the purpose of the double jeopardy clause "is to ensure that sentencing courts do not exceed, by the device of

multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments. " **Jones v. Thomas, 491 U.S. 376, 109 S.Ct. 2522, 2527, 105 L.Ed.2d 322 (1989).** [5]

The double jeopardy clause prohibition of multiple punishments which are not legislatively authorized, **see Jones v. Thomas, 491 U.S at 109 S.Ct. at 2527,** could only be waived if the defendant were able to confer upon the court the authority which the legislature has withheld. However, this is precisely the sort of authority that a defendant cannot give by agreement. The crimes for which a defendant may be convicted and sentence are prescribed by the will of the legislature, not by that of the defendant or the procesutor. " A defendant cannot confer on others the right to do something the law does not permit. For example, a defendant cannot by agreement confer on a judge authority to exceed the penlties established by law. " **Larson, 512 So.2d 1371.** Accordingly, neither the illegality of multiple convictions for the same offense, nor the illegality of multiple sentences, can be waived. All that is susceptiblr to waiver is the right to demonstrarte, in an evidentiary hearing, the existence of a double jeopardy claim. **See Broce.** If the violation is a apparent the trial court does not have the

5 See also Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct 673,678, 74 L.Ed.2d 535 (1983)(double jeopardy clause " does no more than pervent the sentencing court from prescribing greater punishment than the legislature intended." State v. Smith, 547 So.2d 613 (Fla. 1989) (same); Kaiser, 893 F.2d at 1303 (" while the government may charge a defendant with both a greater and and a lesser included offense and may prosecute those offenses at a single trial, *** , the court may not enter separate convictions or impose cumulative punishments for both offenses unless the legislature has authorized such punishment...") (citations omitted).

authority to adjudicate and sentence the defendant in a manner contary to legislative intent,and in violation of the double jeopardy clause. And neither the defendant nor the prosecution can give the court the that authority.

Challenge to Sentences:

It appears to be well-setteled that a sentence which constitutes multiple punishment against double jeopardy, is an " illegal sentence," **see Arnold v. State, 578 So.2d 515, 516 (Fla. 4th DCA 1991),** and that because the illegality of a sentences in not waived by a plea, **Robinson v. State, 373 So.2d 898, 902 (Fla. 1979)** a violation which is apparent from the record may be challenged on appeal, even when the sentence was entered pursuant to a guilty plea, **see Aronld at 516; Robins v. State, 413 So.2d 840 (Fla. 3rd DCA 1982); Dukes v. State, 464 So.2d 582 (Fla. 2nd DCA 1985).** [6]

However, in the present case, the district court of appeal made an exception for cases which involve negotiated pleas, and held that " a defendant who enters into a negotiated plea and sentence bargain with the prosecution thereby waives an otherwise viable double jeopardy [7] objection to sentences which form a part of the agreement. " **Novaton v.**

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6 See also Guardado v..State, 562 So.2d 696 (Fla. 3rd DCA 1990), review denied, 576 So.2d 287 (Fla. 1990); Irizarry v. State, 578 So.2d 711 (Fla. 3rd DCA 1990), disapproved on other grounds, 595 So.2d 273 (Fla. 1992); Carr v. State, 430 So.2d 978 (Fla. 3rd DCA 1983); Anderson v. State, 392 So.2d 328 (Fla. 3rd DCA 1981); Davis v. State, 392 So.2d 947 (Fla. 3rd DCA 1980); Hines v. State, 401 So.2d 878 (Fla. 3rd DCA 1981).

7 In Zaetler v. State, 616 So.2d 461 (Fla. 3rd DCA 1993), the court extended this exception to a case involving a nolo contendere plea.

State, 610 So.2d 726, 727 (Fla. 3rd DCA 1992).

According to the district court of appeal, the illegality of a sentence which involves a violation of the rule against multiple punishment is not illegal in the same sense that a sentence which exceeds the statutory maximum is illegal. Such a sentence is not " void " and its illegality can be waived. **Novation, 610 So.2d at 728 n 3.** Not only is waiver possible, it need not be affirmative or express. It is sufficient that the defendant agreed to sentences **(which happen to be inpermissibly multiplicitous)** in consideration for the state's " leniency in other respects. " **Novaton at 728.** The district court's analysis depends on ignoring the fact that a sentence which is illegal because it exceeds the pentalty established by law, and that it is precisely this sort of illeglity which has always held to be unwaivable. **E.g. Larson.**

It is true that certain sentencing defects can be waived. For example, sentencing guidelines errors that involve disputed issues of fact may be waived by the failure to object in the trial court. **See Huffman v. State, 611 So.2d 2 (Fla. 2nd DCA 1992).** Even certain fundamental sentencing errors, such as the court's failure to make the factual findingsneeded to impose a particular sentencing alternative, may be affirmatively waived. **E.g., State v. Rhoden, 488 So.2d 1013, 1017 (Fla. 1984) (legislative mandate that judge must make written findings required by section 39.111(7), Florida Statutes, before imposing adult sanctions on juvenile, cannot be avoided " absent an intelligent and knowing waiver of that right by a juvenile "); Sirmons v. State, 18 Fla. L. Weekly S356 (Fla. June 24, 1993)(negotiated plea of guilty does**

not automatically waive section 39.111 (7) requirement of written findings; the waiver must be " manifest on the record"); Suarez v. State, 616 So.2d 1067 (Fla. 3rd DCA 1993)(defendant may stipulate that he qualifies as a habitual offender); Quarterman v. State, 527 So.2d 1380 (Fla. 1988)(plea bargin can be valid reason for a departure sentence).[8]

However, these are all instance in which the legislature has given the courts the authority to impose a certain type of sentence when certain factual circumstances are found to be present, and the defendant in effcet stipulates that those circumstance exist. They do not provide support for the view that a defendant waives the apparent error of imposing a sentence which exceeds the limits established by the legislature.

The factual predicate needed to impose a particular sentence, a

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[8] A defendant may also be estopped under certain circumstances from objecting to the corection of a sentence which is move lenient than could lawfully be imposed. See Madrial v. State, 545 So.2d 392 (Fla. 3rd DCA 1989). That type of case, however, turns on a different aspect of the double jeopardy clause, namely, that of the protection of legitimate expections of finality in the severity of a sentence. The two aspect are related because, obviously, the legitimacy of a defendant's expectations will be affected by the legislative limiations placed on the court's sentencing discrection. But they are also distinct.

A defendant may bargin away his expections, or erode or do away with the legitimacy of those expectations, see Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); Goene v. State, 577 So.2d 1306 (Fla. 1991); Prestridge v. State, 519 So.2d 1147 (Fla. 3rd DCA 1988)., but he cannot give to the court a power which the legislatiure has denied.

While the double jeopardy protection which was subject to waiver in cases such as Rickettss, Prestridge, and Madrigal, might be characterized as " personal " to the defendant, the protection against multiple punishments for the same offense in a single proceeding cannot be so characterized. A waiver of this protection is tantamount to conferring an authority upon the court to do what the legislature did not intend it to do. A defendant cannot have this ability, and therefore this protection is jurisdictional, not personal, and cannot be bargained away.

predicate which the state would otherwise be reuired to prove, can be waived by the defendant, just as he waive the state's burden of proving his guilt. But neither the defendant nor the state can create new sentencing alternatives, or extend the sentencing limits prescribed by the legislature, or confer upon the court the authority to do either of theses things. **E.g., Larson v. State, 572 So.2d 1368, 1371 (Fla. 1991) (" a defendant cannot by agreemnet confer on a judge a uthority to exceed the penalties established by law "); Williams v. State, 500 So. 2d 501, 503 (Fla. 1986)("[a] trial court cannot inpose an illegal sentence pursuant to a plea bargain "),** receded from on other grounds in **Quarterman v. State, 527 So.2d 1380 (Fla. 1988). See also Ex Parte Bosso, 41 So.2d 322 (Fla.1949); Helton v. State, 585 So.2d 412 (Fla. 2nd DCA 1991).** A sentence which on its face violates the double jeopardy prohibition of unauthorized punishment exceeds the penlty established by law, and constitutes jurisdictional error.

Challenge to Convictions

The Second and Fourth District Courts of Appeal have held that a guilty pleas or a plea of nolo contendere without reservation of the right to appeal, does not waive the right to challenge either convictions or sentences on double jeopardy grounds. **Kurtz v. State, 564 So.2d 519 (Fla. 2nd DCA 1990); Arnold v. State, 578 So.2d 515 (Fla. 4th DCA 1991).** Accord **Rodriquez v. State, 591 So.2d 211 (Fla. 4th DCA 1991); Lundy v. State, 596 So.2d 1167 (Fla. 4th DCA 1992); Rembowski v. State, 618 So.2d 383 (Fla. 4th DCA 1993); Watson, 608 So.2d 512 (Fla. 2nd DCA 1992).** As noted in **Kurtz,** this view reflects the " general parctice of the appellate courts, " which has been " to vacate which presents a double

jeopardy problem. " Kurtz at 521.

In the Third District Court of Appeal, however, the rule is otherwise. As the district court of appeal reiterated in this case, in the Third District the entry of a guilty plea may not waive the right to challenge the double jeopardy violation involved in multiple sentences, but it does waive the right to clallenge the convictions themselves. Novaton v. State, 610 So.2d 726, 727 (Fla. 3d DCA 1992).[9] This rule is founded on a view of double jeopardy protections which has not been the law since the decision in Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975). It derives from a line of cases which conceived double jeopardy as a purely personal (nonjurisdictional) defense which could be waived simply by the failure to timely raise it. Under that view, double jeopardy objections were waived if not timely raised in the trial court in accordance wiht the rules of criminal procedure. And this was so regardless of whether the defendant went to trial, or entered a guilty plea. See Sands v. State, 403 So.2d 1090 (Fla. 3d DCA 1981); Hines v. State, 401 So.2d 878 (Fla. 3d DCA 1981); Taylor v. State, 401 So.2d 877 (Fla. 3d DCA 1981); Chapman v. State, 389 So.2d 1065 (5th DCA 1980); Bell v. State, 362 So.2d 244 (Fla. 4th DCA 1972); Suiero v. State, 248 So.2d 219 (Fla.4th DCA 1971); Robinson v. Wainwright, 240 So.2d 65 (Fla. 2d DCA 1970); Robinson v. State, 239 So.2d 282 (Fla. 2d DCA 1970); Peel v. State, 150 So.2d 281 (Fla. 2d DCA 1963). [10] (see next pgae for footnote 10).

After Menna, and this court's decision in State v. Johnson, 483

9 See also Guardado v. State, 562 SO.2d 696 (Fla. 3d DCA), review denied, 576 So.2d 287 (Fla. 1990); Irizarry v. State, 578 So.2d 711 (Fla. 3d DCA 1990), disapproved on other grounds, 594 So.2d 273 (Fla.1992) Dukes v. State, 464 So.2d 582 (Fla. 2d DCA 1985); Williams v. State, 400 So.2d 100 (Fla. 3d DCA 1981); Williams v. State, 397 So.2d 438 (Fla. 3d DCA 1981); Davis v. State, 392 So.2d 947 (Fla. 3d DCA 1980).

So.2d 420 (Fla. 1986), double jeopardy violations are no longer waived merely by the failure to make a contemporaneous objection. In **Johnson**, this court held that " the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim, " **Johnson at 423**, and recognized that double jeopardy claims may be reviewable, even when the conviction is the result of a guilty plea, **Id. at 422**. The holding of **Johnson** overruled the whole line of cases which required a timely objection, and thereby removed the foundation for the doctrine that the mere entry of a plea constitutes a waiver of the right to challenge duplicitous convictions.

It might have possible, even after **Menna**, to assert that, by entering a guilty plea, the defendant has affirmatively waived the right to challenge the illegality of multiple convictions, on the theory that the plea is an agreement to an adjudication of guilt. **See Robinson v. State, 373 So.2d 898, 901-2 (Fla. 1979); Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) (" a plea of guilty is more than an admission of conduct, it is a conviction "). See also Arnold, 578 So.2d at 517 (noting that cases relied upon by the third district appear to turn on view that " where two or more crimes are alleged in the charging document so that the**

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[10] It appears that this is also the rule in the First District. See Wright v. State, 573 So.2d 998 (Fla. 1st DCA 1991)(holding, in a case which went to trial, that double jeopardy challeng to multiple convictions was waived because of failure to object in the trial court).

accused knew or reasonably should have known that the charges were multiplicitous and the accused enters a counselled and knowing plea to those charges, it may be assumed that he voluntarily waived his double jeopardy claim "). However, that argument is contrary to **United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989).** Under **Broce,** the entry of a plea does not waive double jeopardy violations which are apparent on the face of the record. All that is waived is the right to present supplemental evidence to show the existence of a nonapparent violation. **United States v. Pollen, 978 F.2d 78, 84(3rd Cir. 1992), cert. denied, ___U.S. ___, 113 S.Ct. 2332 (1993); Taylor v. Whitley, 933 F.2d 325, 328 (5th Cir. 1991); United State v. Quinones, 906 F.2d 924, 927 (2nd Cir. 1990), cert. denied, ___U.S. ___, 111 S.Ct. 789, 112 L.Ed. 2d 851 (1991).**

The **Broce**limitation--that the violation must appear on the record existing at the time of the pleas--is not applicable here, since, as both the State and the District Court of Appeal recognized, the **Cleveland** violation is apparent from the face of the record. Nor will it ever be an impediment to asserting a **Cleveland**-type of violation will always be apparent from the face of the record which existed at the time of the plea, because the court is required to " receive in the record factual information to establish the offense to which the defendant has entered his plea. " **Koening v. State, 597 So.2d 256, 285 (Fla. 1992).** Since it is fundamental error not to receive such a factual basis in the record, **Koening,** it must follow that **Cleveland**-type violations are always appealable.

Moreover, as noted in **Arnold** and **Kurtz,** the legislature has not

authorized convictions in which additional punishment would be improper. Although the legislative intent may once have been different, **See State v. Hegstrom, 401 So.2d 1344, 1346 (Fla. 1981)(construing former section 775.021 (4)),** the present version of section **775.021 (4), Florida Statutes,** " announces the legislature's intent to both ' convict and sentence ' for each criminal offense committed in the course of one criminal episode or transaction with certain exceptions." **Kurtz, 564 So.2d at 521;** accord **Arnold, 578 So.2d at 517.** That interpretation of the legislature's intent is supported by the fact that in Florida, convictions can affect the length other sentence.

With the enactment of the guildelines, it is no longer possible to neatly separate the ideals of conviction and sentence. The operation of the guidelines makes clear that convictions are in a very real sence " penalties. " Even when a separate sentence is not imposed for a particular conviction, it may nevertheless be scored (either in that case, or in a subsequent case) and thereby affect the other sentences imposed. **See Guardado v. State, 562 So.2d 696, 697 (Fla. 3rd DCA)(" by virtue of the nolo contendere plea the convictions for the two ofenses cannot be attacked, " and " [b]ecause the conviction itself will stand, it follows that the points for that offense were properly included inthe scoresheet "), review denied, 576 So.2d 287 (Fla. 1990).** The second and fourth district courts of appeal have properly concluded that this is impermissible, and that the distinction between convictions and sentences for double jeopardy purposes must be rejected. Whether or not the conviction occurs in a guidelines case, it can have the effect of a penalty, and for double jeopardy purposes it must be treated

as much. " This is necessary under the sentencing guildelines to avoid scoring' unsentenced ' convictions as additional offenses or prior offenses, and thereby impermissibly punishing the defendant." **Kurtz, 564 So.2d at 521; Arnold, 578 So.2d at 517.**

Because a defendant cannot confer on others teh authority to do what the law does not permit, **Larson, 572 So.2d at 1371,** and because an unauthorized conviction is no less unauthorized than an unauthorized sentence, the right to challenge either convictions or sentences on double jeopardy grounds is not waived by a plea of guilty. **See Kurtz; Arnold.**

In this case, the **Cleveland** violation was not affirmatively waived Under this court's decision in **Cleveland v. S tate, 578 So.2d 1145 (Fla. 1991),** where an offense has been enhanced because of the use of a firearm, the legislature did not intent separate punishment also be exacted for the offense of possession of a firearm during the commission of the same felony, and, accordingly, such cumulative punishment is barred by the double jeopardy clause.

Here, as the State and the district court of appeal both recognized **Mr. Melvin's** convictions and sentences for unlawful possession of a firearm while engaged in a criminal offense, are impermissibly duplicitous under **Cleveland,** and the violation is apparent from the face of the record.[11] In both cases, the use of a firearm resulted in enhance-

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11 **According to the informations, and the factual basis stated for the plea, the defendant used a firearm to effect a murder of the second degree with a firearm, unlawful possession of a firearm while engaged in a criminal offense and attempted first degree murder with a firearm, unlawful possession of a firearm while engaged in a criminal offense. (89-46022; 90-3133).**

ment of the defendant's other convictions and, accordingly the double jeopardy clause barred the separate convictions and sentences for unlawful possession of a firearm while engaged in a criminal offense, based on the same act of using that firearm. **Cleveland.**

As set forth above, this particular type of double jeopardy violation is not waivable. It certainly is not waived by the mere entry of a plea. If it is waivabl at all, the waiver must be express. **See State v. Johnson, 483 So.2d 420 (Fla. 1986); Taylor v. Whitley, 933 F.2d 325, 328 (5th Cir. 1991).** As stated in **Taylor: " A defendant who enters a guilty plea despite indictments or a trial court record that evince on their face a double jeopardy violation must expressly relinquish his right against double jeopardy; otherwise, he has not waived his right to challenge the double jeopardy violation. " Taylor, 933 F.2d at 330.**

The record in the case contains no express of affirmative waiver of the double jeopardy claim, or even any any awareness on the part of anyone that the charges were impermissibly cumulative. Melvin, agreed to the convictions and sentences, but never expressly waived the double jeopardy violation. Although, as in every negotiated plea, theagreement to particular sentences and convictions was given in consideration for the state's " leniency in orther respects, " **Novaton at 728,** this is not the same as the express relinquishment of a known right. **See also, e.g., Sirmons v. State, 18 Fla. L. Weekly S356 (Fla.**

Based on the same incidents, Melvin was also charged with two counts of unlawful possession of afirearm while engaged in a criminal offense, in violation of section 790.07(2), Florida Statutes. Count (II) of case 89-46022, alleged that the defendant displayed a firearm. " while at said time and place the defendant was committing a felony to wit: Attemped Murder... Similarly, Count (II) of case 90-3133, alleged that the defendant displayed a firearm, " while at siad time and place the defendant was committ-

June 24, 1993)(negotiated plea does not automatically requirement of written findings when sentencing minor as adult, the waiver must be manifest on the record). All that waived was his right to make an evidentiary showing that the convictions and sentences were in fact impermissibly duplicitous. See Broce, here, however, no such additional showing is necessary. The illegality is apparent on the face of the record. Accordingly, those illegal convictions and sentences must be vacated. See State v. Johnson, 483 So.2d 420 (Fla. 1986); Menna; Kaiser; Pollen; Taylor v. Whitley; Arnold; Kurtz. Cf. Broce.

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ing a felony, to wit: Murder.

He was adjudicated guilty and sentenced for all four charged offenses pursuant to his no contest plea. In case (89-46022; 90-3133).

CONCLUSION

Based upon the above foregoing argument and authorities, Petitioner requests that this court quash the decision of the District Court of Appeal and remand with directions to vacate the two counts of possession of a firearm during the commission of a felony; and based upon the merits of Petitioner's argument Petitioner should be allowed to withdraw his plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by Mail to the Office of Mr. Robert Butterworth, Attorney General, criminal Division, P.O. Box 013241, Miami, Florida 33101 This 10th day of February 1994.

Frederick E. Melvin

Frederick E. Melvin, Pro se
Petitioner